Supreme Court, U.S.
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No. 93-_____

In The

Supreme Court of the United States

_____ TERM, 199____

In Re the Custody of:
H.J., a Minor,

In Re the Guardianship of:
H.J., Ward.

In the Matter of the Appointment
of a Trustee for the next-of-kin
of Lucy Kathleen Johnson and
Joyfull Johnson, Decedents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

The Minnesota Supreme Court affirmed the Court of Appeals decision, affirming the trial court, which refused to return custody of 10-year-old H.J. to her natural father, a Seventh Day Adventist. The Court instead granted custody to the foster parents, primarily because H.J. had been in their custody for more than three years. H.J. had lost her mother and older sister in a fatal car accident in July, 1991, and had grown dependent upon Respondent-foster parents, who claimed that Petitioner had not become adequately rehabilitated as natural father.

The foster parents are pentecostal/ charismatic Christians whose beliefs markedly differ from Petitioner, a Seventh Day Adventist. The foster parents had contracted with the County to be merely temporary custodians, and to seek return of the child to her natural parent at the earliest practicable time.

H.J.'s return of custody was denied to her natural father despite the 10-year-old's prior stated desire to be returned to his custody. Petitioner's home state of Hawaii had recommended through Maui County Child Protection Services that Petitioner be granted custody. The Court expressly found that the Human Services' Department in Minnesota "did not have any plan to reunite H.J. with her father, and that they had not made any meaningful effort in that direction" (App. 125).

1. Did the Court deny Petitioner due process by granting the foster parents standing to intervene in his dependency/neglect/ CHIPS proceeding by consolidating for trial Respondent-foster parent's custody Motion?

2. Did the Court's failure to ensure Petitioner's rights as biological father violate due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution?

3. Did the Court violate the Free Exercise clause of the First Amendment to the United States Constitution by denying custody to Petitioner, a Seventh Day Adventist?

4. Did the Court violate Petitioner's due process rights to continue to serve as Trustee of the wrongful death case he commenced seeking damages for the death of his daughter, Joyfull, wife, Lucy, and for injuries to his daughter, H.J.?

PARTIES

Jay Johnson, Petitioner
Mark Paul Dulaney and Diane LaVonne Dulaney, Foster Parents
Dodge County Department of Human Services
H.J., Minor
Gail Baker, Guardian Ad Litem

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The trial court's decision is attached at App. 1. The decision of the Minnesota Court of Appeals is reported in 1993 WL 290252. Review was denied by the Minnesota Supreme Court on September 30, 1993.

JURISDICTION

The Minnesota Supreme Court entered its opinion in this case on September 30, 1993. This Court has jurisdiction under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner is the natural father of 10-year-old H.J., sole family survivor of a fatal car crash in July, 1991, which killed Petitioner's former wife and 12-year-old daughter, Joyfull.

A "CHIPS" proceeding was commenced against Petitioner and his wife on November 9, 1989, resulting in his qualified admission to a portion of the allegations. Petitioner thereafter returned to his native State of Hawaii to comply with Dodge County Human Services' requests and prepare his home for reunification with his children. In February, 1991, both children returned to Hawaii for a visit and desired to remain there for reunification with their father. Respondent Dodge County refused their request, despite the initial urging by Respondent foster parent Diane Dulaney that such was in the children's best interest.

Thereafter, in July, 1991 a tragic accident took the lives of Petitioner's former wife and their minor child, Joyfull. Petitioner immediately came back from Hawaii to Minnesota, seeking H.J.'s custody and return to Hawaii. Despite the Court's interim Order and intent to reunite father and daughter, and to refer the case to Maui County, Hawaii for any further necessary proceedings, the Court granted the foster parents standing to intervene with their Petition for permanent custody, which Petition was ultimately granted after 16 days of trial.

Post-trial Motions resulted in vacation of Petitioner's appointment as trustee in the wrongful death action brought on behalf of himself and his daughter arising from the loss of his wife, Lucy, and daughter, Joyfull, and H.J.'s personal injuries.

Petitioner and his deceased wife, Lucy, were both raised in Southern California, meeting in Hawaii and marrying in 1976 (App. 3-4). Lucy Johnson had been institutionalized on three separate occasions prior to their marriage for psychotic schizophrenia (Tr. 134). For the first nine years of their marriage, the family was closely-knit, committed to the Seventh Day Adventist Church, and had only occasional problems until 1988 (Tr. 2176). On certain occasions when Lucy had difficulty with her mental problems, the children were taken care of solely by Petitioner for a period of up to three months, and on other occasions were placed either with family friends or with Petitioner's parents, until Lucy's problems subsided (Tr. 2170).

Discipline was limited to first "talking things through", then "time-out", and finally removal of certain privileges (Tr. 103-104). Under unusual circumstances, if the children were acting in a rebellious or defiant manner against their mother, spanking might be necessary (Tr. 66).

On a rare occasion, particularly after observing their mother engaged in kicking, screaming or hitting behavior, for a time period between 10 and 30 minutes, the girls would mimic their mother's behavior, screaming in such a way that Lucy or Petitioner would put their hand over a child's mouth and nose for a few seconds to calm them down (Tr. 79). Petitioner later recognized this as an inappropriate form of discipline which caused the children fear and apologized to them during the summer of 1990 (Tr. 79).

The children were well fed on a vegetarian Seventh Day

Adventist diet, and were generally healthy and energetic (Tr. 95-96).

During the last several years of the marriage, it became increasingly difficult for Petitioner to shield the children from the impact of his wife's mental illness. Jay described Lucy's deteriorating change in personality as follows:

> "Lucy would frequently kick or punch me, hit me, throw heavy objects at me. She bloodied my nose at least twice here (in Minnesota), once in front of the girls (Tr. 2222) . . .
>
> "It came to a point where I wasn't safe saying anything to her, and sometimes I would say something and my motives were right, and I was trying to communicate and she would fly into a fury over it. She would punch me, kick me, throw something at me; I am sure I was hit and kicked hundreds of times" (Tr. 2223). . .
>
> "One time she came up behind me with a frying pan, was going to break the frying pan over my head, and I had no question she would have used knives. There were times I felt like something woke me in the night to hide the knives. . . she was going to go over and visit a woman who was taking care of our daughters one time at one in the morning with a 16-inch butcher knife she put in her suitcase to go visit her. And she threatened a social worker on Molokai with a pair of scissors one time (Tr. 2224)."

In September, 1989, Petitioner and Lucy placed the children

voluntarily with trusted friends in a final attempt to salvage their marriage (Tr. 2225). Lucy then threatened that she would "have another breakdown" unless Jay left the house (Tr. 2227). After the emotional exhaustion of the prior several months from living with his increasingly psychotic wife, Petitioner took time off to travel in Texas, staying with an older couple who were long term friends of Lucy. He believed his children would be safe with his friends, who also had children close to the age of H.J. and Joyfull (Tr. 2229).

Without Petitioner's consent, the children were removed from the friends' home and placed in foster care with Respondents Dulaneys.

A "CHIPS" proceeding was commenced against Petitioner and his wife on November 9, 1989, resulting in his qualified (pro se) admission to a portion of the allegations (Tr. 2241).

Upon his return from Texas a month or two later, Petitioner proceeded to make plans to return to his native home state of Hawaii of the past 20 years. In order to obtain the return of custody of his two daughters, Petitioner testified that he:

> "tried to think through where else could I effectively set up house, be productive, be accepted in the community, get everything on an even keel as possible and follow the court order? And where would the girls want to be, too. They loved Hawaii. They wanted to be in Hawaii. And I needed to have distance between me and Lucy because she was . . . (an) impossible person to be with, and I felt that there was no hope for her and I being together with the girls." (Tr. 2240).

Upon arriving in Hawaii in November, 1989, Petitioner immediately began working with Hawaiian Child Protective Services (C.P.S.) to get custody of his daughters back. He completed a nine-week S.T.E.P. parenting program, along with a program called "Alternatives to Violence" (Tr. 2242). Petitioner was then referred by Hawaiian C.P.S. to Harold Roberts, who counseled with him weekly for an average of two hours per week from November, 1990 until June, 1991 (Tr. 2261).

In February, 1991, both children returned to Hawaii for a visit, and exhibited a strong desire to remain there and be reunified with their father (Tr. 2295). Respondent Dodge County Human Services refused this request, despite the urging by Respondent foster parent Diane Dulaney that custody with their father was in the best interest of the children (Tr. 2294).

After the tragic accident in July, 1991, which took the lives of Petitioner's wife Lucy and their minor child, Joyfull, Petitioner immediately travelled from Hawaii to Minnesota, intending to return to Hawaii with H.J. in his custody (Tr. 2314). The Court initially stated its intent to reunite father and daughter, and to refer the case to Maui County for any further necessary proceedings. The Dodge County Attorney's office strongly advocated for the same request, both pre- and post-trial, despite the contrary request of its client, Human Services. The Court later nonetheless granted the foster parents standing to intervene with a Petition for permanent custody, which Petition was consolidated for trial, and ultimately granted after 16 days of testimony.

Petitioner Jay Johnson testified at trial confirming his continued efforts to fully comply with all requests of Dodge County Human Services. The Court originally found in its Order of August 19, 1991 that "(Petitioner) has in essence followed the court orders in this case". Mr. Johnson detailed his involvement

in counseling over a two-and-one-half year period (Tr. 2241), including work with four counselors in Hawaii, and follow-up with a counselor in Minnesota (Tr. 2338). Petitioner expressed his feelings of deep love and concern for H.J. (Tr. 2641), expressing his sincere belief that she would never be "healed" from the pain of her recent past until she was reunited with him (Tr. 2652). Petitioner expressed concerns that the "bond" between H.J. and the Dulaneys was unhealthy, and constituted an emotional "crutch" (Tr. 2651). Although Petitioner acknowledged that the need for H.J. having a "substitute mother" may have existed immediately after the accident, the dependent relationship which developed thereafter was counterproductive to her growing up. Even the trial court found in its prior Order of August 19, 1991 that:

> ". . . ultimately if the child is to be returned to her father, the bonding between the Dulaneys and Hopefull Johnson must be terminated".

Petitioner agreed with psychologist, Dr. Philip, that although at a superficial level H.J. claimed to be happy only if she could stay with the Dulaneys in Minnesota, at a much deeper level, her true desire was to return home with her father (Tr. 2689). Petitioner expressed his strong commitment to work together with potential interim foster parents in Hawaii, along with Reverend Roberts and also Petitioner's own father and stepmother living in Hawaii, all to facilitate H.J.'s successful transition to life together with him back on the island of Molokai (Tr. 2685).

In post-trial Motions, Petitioner's request for Dodge County Human Services to work with him to establish a plan to facilitate his reunification with H.J. was denied, converting the CHIPS dispositional proceeding into the equivalent of a termination of

parental rights case. The denial of Petitioner's request to modify the supervised visitation restriction has resulted in almost no visitation taking place at present.

In addition, Petitioner was removed as trustee in the wrongful death proceeding involving the death of his wife, Lucy, and daughter, Joyfull, and injuries to his daughter, H.J.

B. Course of Proceedings

Over Petitioner's objection, the trial court granted Respondents/foster parents standing to intervene in Petitioner's CHIPS proceeding by consolidating their custody Motion for trial. Petitioner was then compelled to endure 16 days of trial, confronting the claims of the foster parents that "bonding" had taken place with H.J., and it was now in his daughter's best interest to live with them. The Court denied Petitioner return of his child and dismissed the CHIPS proceeding granting custody to the foster parents.

The Court nonetheless found that Human Services "did not comply with Minn. Stat. Sect. 257.071, Subd. 2 on review of the six months placements, and did not comply with Minnesota Department of Human Services Regulation part 9560.0610 sub-part 3 (App. 124)." The Court also stated that it "cannot find that Human Services either had a plan to reunite the children with their father Jay Johnson and made little, if any, effort in that direction" (App. 125).

Subsequent to granting the foster parents custody, in post-decree motions, the court also substituted the foster father in Petitioner's Place as trustee in the wrongful death case he brought on behalf of his deceased daughter and his wife, and for injuries to his surviving daughter, H.J. The Minnesota Appellate Courts

affirmed the trial court's determination in all respects.

REASONS FOR GRANTING THE WRIT

1. The Court denied Petitioner due process by granting the foster parents standing to intervene in his dependency/neglect/ CHIPS proceeding by consolidating for trial Respondent-foster parent's custody Motion.

Natural parents have a fundamental liberty interest in the care and custody of their children. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court held as a matter of due process of law that the natural father was entitled to a hearing on his fitness as a parent before his children were taken away from him. In reversing the lower court, the Supreme Court held that the unwed father had also been denied equal protection under the Fourteenth Amendment as other parents were entitled to the hearing by reason of their marital status, which unfairly denied him due process protection.

The Court observed that the State thwarted its express goal of protecting the welfare of children and strengthening family ties whenever possible, by separating children from their father before first determining whether he was unfit. The father had a due process right to a hearing on the issue of his fitness as a parent, without bypassing other proceedings as the State had sought to justify.

As the Court held in Board of Directors of Rotary International v. Rotary Club of Duarte, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (U.S. 1987), the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. The First Amendment protects those relationships, particularly including intra family relationships.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632, the Court held that there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as is the decision to bear a child.

Contrasted are the rights of foster parents, who have significantly less protection. In Smith v. Organization of Foster Families for Equality & Reform, (1977) 431 U.S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094, the Court held that even where a precipitous and perhaps improvident decision to remove a child from his foster family may constitute a grievous loss to the foster family, such does not implicate due process guarantees of the Fourteenth Amendment.

Various state appellate courts have differed greatly in recognition of foster parent interests. State Supreme courts have typically held that foster care arrangements on a temporary care basis do not involve constitutionally protected liberty interests, where it is clearly understood that the child is not placed with foster parents for either adoption or long-term foster care. Nye v. Marcus, 198 Conn. 138, 502 A.2d 869 (1985).

New York courts permit foster parents standing in hearings to determine the foster parents' rights only after the rights of natural parents have been terminated. Foster parents are denied any input into prior hearings, particularly where the natural parents' shortcomings are being explored by the Court.

In People ex rel Anonymous v. Saratoga Co. Dept. of Public Welfare, 30 App. Div. 2d 756, 291 NYS 2d 526 (1968 3rd Dept.); In Re M, 110 Misc. 2d 297, 441 NYS 2d 950 (1981), the Court rejected the foster parents' claim of standing confirming that they were simply "contract service providers". The Court emphasized that the very existence of the status of foster parents arose out of the knowingly assumed contractual relationship between them and

the State. The Court stated that it saw no tendency by higher courts to broaden rights granted to foster parents by the legislature. Despite the five-year residence of the children with the foster parents, the Court concluded that granting foster parents standing to Petition for custody would disrupt stability, continuity, and consistency of the children's environment and would be contrary to public policy of the State.

Other states have taken a similar position, denying foster parents standing to intervene in a custody proceeding, where it is alleged that the natural parents had neglected or abandoned their children. See In Re: Trapp, 593 S.W.2d 193 (MO 1980) app. dismd., 72 L. Ed. 2d 840, 102 S. Ct. 2226, reh. den. (US) 73 L. Ed. 2d 1377, 102 S. Ct. 3499); E.G. v. C.M.M., 155 N.J. Super. 555, 383 A. 2d 125 (1978); Oxendine v. Catawba Co. Dept. of Human Services, 303 N.C. 699, 281 S.E.2d 370 (1981); Commonwealth ex rel. Ebel v. King, 162 P.A. Super. 533, 58 A.2d 484 (1948); In Re Welfare of Becker, 14 Wash. App. 506, 543 P.2d 359 (1975); rev. on other grounds, 87 Wash. 2d 470, 553 P.2d 1339.

In contrast, several states have granted standing to foster parents, including decisions in the following cases: In Trotter v. Pollan, 311 S.W. 2d 723, (Tex. Civ. App. 5th Dist. 1958); In Re Connie M., 176 Cal. App. 3rd 1225 (5th Dist. 1986); In Re S.J.K., 149 Ill. App. 3rd 663 (5th Dist. 1986).

There is thus a major conflict among State Appellate Courts on whether foster parents have standing to litigate the disposition of a child in a dependency/neglect/CHIPS proceeding. Prior Minnesota case law denied foster parents standing to litigate.

In State ex. rel. St. Louis County Welfare v. Niemi, 284 Minn. 225, 169 N.W.2d 758 (1969), the Court properly noted that any arrangement which permits the bonds formed between a child and

its temporary custodian to frustrate any hope for permanent restoration to its natural family is inconsistent with the primary statutory objective of foster care.

The Minnesota Supreme Court's position was reiterated in Re the Welfare of G., 268 N.W.2d 420 (Minn. 1978), where nonadopting foster parents lacked standing to intervene in the disposition of a neglected child originally placed in their home at the age of 45 days, after having cared for the child for nearly ten years. The court recognized that a "strong bond and attachment" had undoubtedly developed between the child and its foster parents, who later may even have become the "psychological parents" of the child.

Nonetheless, the Court emphasized that the foster parents had signed a written agreement mandating return of the child when its best interests would be so served. The only exception to the Minnesota statute recognized by the Court was after legal adoption by the foster parents had taken place. The Court noted that the foster parents' placement agreement was clearly not intended to create a permanent relationship between foster parents and child. The creation of any substantive right of nonadopting foster parents to the child placed in their temporary care was found to be incompatible with the statute and with clearly established long-standing rights of natural parents.

The Court in Re Welfare of Mullins, 298 N.W.2d 56 (Minn. 1980) likewise denied the foster parents' standing to Petition the court for a finding of dependency/neglect on behalf of their foster child against that child's natural father. The more recent case of In re: E.A.Q.D., 405 N.W.2d 262, 264 (Minn. App. 1987) permitted intervention. However, E.A.Q.D. involved the placement of two children with separate fathers, each of whom had little if any involvement with their child over a seven-year period. The

most recent case of In the Welfare of J.L.U., 450 N.W.2d 642 (Minn. App. 1990), noted the court's ongoing concern for joinder of such cases, particularly involving third party custody, stating that:

> "in both types of proceedings, the best interests of the child are paramount. However, a petition for permanent custody involves different issues from a petition alleging that a child is in need of protection or services. Id. A disposition in a juvenile protection proceeding may be reviewed frequently, while modification of a custody determination made under chapter 518 is limited by statute. See Minn. Stat. 518.18 (1988); Minn. R. Juv. Cts. 62.06; 62.07. Chapter 260 governs temporary placement of a child in need of protection, while chapter 518 focuses on issues of permanency." 450 N.W.2d at 644 (emph. supp.).

Granting of the Writ would allow this Court to clearly establish for all States what standing foster parents have to assert any constitutionally protected liberty interests in foster children prior to completion of adoption or termination of parental rights proceedings. The present extent to which foster parents may infringe upon the rights of natural parents in seeking to preserve the integrity of the foster family is not at all clear. The court below clearly erred in granting Respondent-foster parents standing to have any role in Petitioner's dependency/neglect proceeding through intervention and consolidation of their custody petition.

As a matter of public policy, short of an adoption or termination of parental rights determination, foster parents should

never be granted standing in a dependency/neglect/CHIPS proceeding. The foster parents' role in this litigation has clearly denied Petitioner his right to due process of law.

2. The Court's failure to ensure Petitioner's rights as biological father violated due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

The Court violated the due process clause of the Fourteenth Amendment to the United States Constitution in failing to return Petitioner's 10-year-old daughter to his custody. Petitioner's home state of Hawaii's Department of Child Protection Services recommended return of custody long before, when H.J. and her still alive sister, Joyfull, both desired to stay in Hawaii with Petitioner, and denying Petitioner due process in protecting his rights as H.J.'s father.

Minn. Stat. 257.071, subd. 1(a) requires as follows:

> "Protection of heritage or background. The authorized child placing agency shall ensure that the child's best interests are met by giving due consideration of the child's race or ethnic heritage in making a family foster care placement. The authorized child placing agency shall place a child, released by court order or by voluntary release by the parent or parents, in a family foster home selected by following the preferences described in section 260.181, subdivision 3."

Minn. Stat. 257.071, subd. 2 requires as follows:

> "Six-month review of placements. There shall be an administrative review of the case plan of each child placed in

a residential facility no later than 180 days after the initial placement of the child in a residential facility and at least every six months thereafter if the child is not returned to the home of the parent or parents within that time. The case plan must be monitored and updated at each administrative review. As an alternative to the administrative review, the social service agency responsible for the placement may bring a petition as provided in section 260.131, subd. 1(a), to the court for review of the foster care to determine if placement is in the best interests of the child. This petition must be brought to the court within the applicable six months and is not in lieu of the requirements contained in subdivision 3 or 4."

Minnesota Department of Human Services Regulation Part 9560.0610, subpart 3 requires:

"Administrative Review of Placement. Within 180 days of the child's initial placement and every six months thereafter, if the child is still in foster care, the placement shall be reviewed by an administrative review panel of appropriate persons, at least one of whom is not responsible for the case management of or the delivery of services to either the child or the parents. The child, the parents and the foster parents shall be advised of the date, time and place of the review. The review shall determine:

1. Whether the placement remains necessary and appropriate;

2. The extent of the compliance with the case placement plan;

3. The extent of progress which has been made toward

alleviating or mitigating the causes necessitating placement in foster care; and

4. The likely date by which the child may be returned to the home or placed for legal adoption or guardianship."

As set forth above in Minn. Stat. 257.071 subd. 2, all Human Services Departments have mandatory obligations to the parents of children placed in foster care to comply with the due process guarantees contained therein. The statute clearly requires a review within the first 180 days of placement, and every six months thereafter. As the trial Court found, no administrative review took place within six months of the original placement (App. 124). In fact, during the entire two-and-one-half year period, only one review was ever conducted (Tr. 1472).

In addition, the trial Court found that Dodge County Human Services had not complied with Department of Human Services Regulation 9560.0610, subpart 3, which requires that such administrative review be conducted by a panel which includes at least one person who:

"is not responsible for the case management of or the delivery of services to either the child or the parents".

It is the presence of the third neutral person which is required to ensure that the parent deprived of custody of his children receives due process (Tr. 1471).

In this case no such due process protection of Petitioner's rights was ever extended. There were no timely reviews. There was no individual who served in a third-party neutral capacity. Based upon the clear violation of both statute and Departmental

Regulations, Dodge County Human Services lost jurisdiction over this matter a long time ago. H.J.'s foster placement was devoid of any monitoring or review of compliance with these significant regulations.

After proceeding to address gender and religious discrimination against Mr. Johnson (App. 124-5), the court stated in its Memorandum that it "cannot find that Human Services . . . had a plan to reunite the children with their father, Jay Johnson, and made little, if any, effort in that direction. . ." (App. 125).

These findings by the trial court reflect in part the gross departure from statutory and regulatory standards mandated in "CHIPS" proceedings. Without enforcement of these safeguards, Petitioner was denied his due process guarantees and the opportunity to be reunited with his children prior to Joyfull's tragic death. The above statutes and regulations constitute a fundamental source of due process guarantees to Petitioner, which he was wrongfully denied.

Mr. Johnson was without legal counsel during critical time periods, including at the time of his qualified admission to one CHIPS allegation, and during time periods after the encouraging visit with both children in Hawaii. It was thus even more critical that both the court and Human Services ensure compliance with all applicable statutes and regulations. Their failure to do so had an impact not only on Jay Johnson's loss of Joyfull, but also on the trial court's erroneous decision regarding H.J.

The ability of the juvenile protection system overall to function in a fair manner, affording minimal due process to a parent, clearly failed in this case. The only safety net remaining for Mr. Johnson was the statutes and guidelines which needed to be strictly construed to prevent further tragedy to both Mr. Johnson and his daughter. The court failed to do that, adding yet more pain

and hardship to the lives of both H.J. and her father.

Human Services failed to involve:

> "a neutral third party who is not responsible for the case management or of delivery of services to either the child or the parents, to ensure meeting the primary goal of reunifying the foster placed child with her natural parents at the earliest date possible."

Mr. Johnson thus never received fair and impartial consideration by either Human Services or the guardian. The Human Services' file reflects its own discriminatory position that if Lucy were ever to be reunited with Jay as a married couple, "the children will not be allowed to go home" (Tr. 2291). Petitioner's ability to satisfy Human Services' demands was doomed from the start by their unfair discrimination. The court has now erroneously condoned past wrongful conduct by Human Services and lack of monitoring by the court itself, all to Jay Johnson's extreme prejudice.

By granting Petitioner a Writ of Certiorari, the Court can correct the extreme abuse of due process which Petitioner has suffered by reason of unfair discrimination against him, merely because of his status as father of his daughter H.J.

3. The Court violated the Free Exercise clause of the First Amendment to the United States Constitution by denying custody to Petitioner, a Seventh Day Adventist.

Respondent-Human Services Department failed to ensure protection of Petitioner's ethnic and religious heritage, by disregarding his concerns for his daughter H.J.'s religious faith, including: attendance at a Seventh Day Adventist school; Sabbath

observance; vegetarian dietary restrictions; and other major religious doctrines long adhered to by the Johnson family as Seventh Day Adventists, all prohibited by Minn. Stat. 260.181, subd. 3; Minn. Stat. 257.071, subd. 1(a). Petitioner continually expressed his deep concerns, but they were generally ignored (Tr. 2659).

The first Amendment provides that "Congress shall make no law. . . prohibiting the free exercise" of religion. This clause has been interpreted to mean that government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs; from coercing him to affirm beliefs repugnant to his religion or conscience; and from directly penalizing or discriminating against him for holding beliefs contrary to those held by anyone else. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560.

The Constitutional protection afforded to freedom of religion is not confined to evangelistic efforts, but includes spreading of religious beliefs within one's family and to the outside community. Murdock v. Pennsylvania, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870. A burden upon religion exists when the State conditions the receipt of an important benefit upon conduct proscribed by one's religious faith, or if one is denied a benefit because of conduct mandated by one's religious beliefs, thereby putting substantial pressure on an adherent to modify his behavior or violate his beliefs. Thomas v. Review Brd. of Indiana Employment Secur., 67 L. Ed. 2d 624, 101 S. Ct. 1425 (U.S. 1981).

The Court recognized yet another class of free exercise claims which continue to be reviewed under the compelling interests test in Employment Division v. Smith, 494 U.S. 872 (1990). The Court referred to these cases as "hybrid" cases involving "not the Free Exercise Clause alone, but the Free Exercise Clause in

conjunction with other constitutional protections." 494 U.S. at 881. Smith holds that hybrid claims will be recognized in at least three circumstances: when Free Exercise is linked to a claim based upon the right of parents to direct the education of their children as recognized in Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972); when a Free Exercise claim is linked to a Free Speech or Free Press claim; or when a Free Exercise claim is linked with a freedom of association claim. Smith, 494 U.S. at 881-82. If a Free Exercise claim is combined with a claim arising out of any one of these three categories, the litigant has a hybrid claim and is entitled to strict scrutiny of any government actions which burden it. Id.

It is clear that if any Free Exercise claim may be considered as a hybrid, Petitioner's claim must be one. Petitioner's Free Exercise claim is reinforced by: 1) his parental rights claim, 2) the freedom to choose the classmates and teachers with whom his daughter will associate during instructional time. Petitioner's claim should be entitled, as a Smith-hybrid, to the protection of the compelling interest test.

In Pierce v. Society of Sisters, this Court struck down an Oregon law which required most children between the ages of eight and sixteen to attend public school. 268 U.S. at 530-31. The Court held that the Oregon legislation unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35. The unanimous opinion of the Court in Pierce recognized this parental right to choose either public or private education for their children as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Id. at 535. See also Meyer v. Nebraska, 262 U.S. 390 (1923). The leading modern case recognizing this parental right is Wisconsin v. Yoder, in which the

Court noted that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. at 232.

Smith reaffirmed both Pierce and Yoder and cited them as examples of hybrid cases in which a Free Exercise claim is linked to a parental rights claim. 494 U.S. at 881. The instant case is a perfect example of this type of Smith-hybrid. Petitioner's Free Exercise claim is inextricably intertwined with his claim to guide and direct the faith and education of his daughter.

Petitioner continually pled with Respondent Human Services to permit his child to be enrolled in a Seventh Day Adventist school in Minnesota, as he had raised both his daughters as Seventh Day Adventists. Petitioner's older daughter, Joyfull, H.J.'s sister, had attended Seventh Day Adventist School in Hawaii. Petitioner's desire to return H.J. to Hawaii and enroll her in the Seventh Day Adventist School was refused. Respondent-foster parents were allowed by Human Services to enroll H.J. in the public school setting. The Department's action violated Petitioner's constitutional rights, which claim must be reviewed under the strict scrutiny test.

A child's spiritual welfare or well-being is properly considered a factor in determining custody and visitation rights under the law of numerous states, including Minnesota. In Andros v. Andros, 396 N.W.2d 917 (Minn. App. 1986), the father attended an Assembly of God church and considered himself "charismatic" or "pentecostal" in his expression of faith. The Court precluded the father from taking his children to church or otherwise proselytizing them because of the negative impact upon them of the father's religious faith, which the Court determined endangered the children's future emotional health. 396 N.W.2d at 923. In Johnson v. Johnson, 424 N.W.2d 85 (Minn. App. 1988), the lower

court was reversed in its award of custody to the father, who was Lutheran and intended to raise the children as Lutherans, despite the children having been raised as Catholics.

Courts in other states have held religious issues to be significant as well. In People ex. rel. Calnan v. Weightman, 246 Ill. App. 394 (1927), the Appellate Court returned a child's custody to its mother from its foster parents. The mother was Catholic. The foster parents were Protestant. The trial court's order was reversed, and remanded for further factual determinations.

In Daubert v. Daubert, 239 MD 303, 211 A.2d 323 (1965), the Court returned custody to the father, a Catholic, from a third party, who took the child to a Protestant church each Sunday. In reaching its decision, the Court noted that the father's wishes concerning the child's religious upbringing were not necessarily controlling, but emphasized the child's confused emotional status and the subconscious strain on the child being brought up in a religion different from his father.

In Aldous v. Aldous, 99 App. Div. 2d 197, 478 NYS 2d 60 (3rd Dist. 1984); Cert. den., 105 S. Ct. 786, the Court held that religion may be considered a factor in determining the best interests of the children. However, the trial court's view that the father's religious beliefs were too discipline-oriented was found to be constitutionally proscribed as a legitimate basis for awarding custody.

Under the above case law, the Minnesota Courts' decision must be reversed because it violates both the free exercise clause and equal protection. The Court granted custody to foster parents who are openly charismatic and pentecostal, a substantially different expression of religious faith than Petitioner, a Seventh Day Adventist. Petitioner continuously objected throughout his daughter's foster care and during trial to the constant exposure of

his daughter by the foster parents to the public school setting; a nonvegetarian diet; breaking of the Sabbath; lack of Adventist teachings; and the foster parents' belief system which included speaking in tongues and other charismatic/pentecostal religious practices.

Petitioner further objected to the foster parents' failure to provide adequate spiritual comfort to his daughter after the tragic loss of his wife and older daughter, Joyfull. Petitioner's daughter H.J. was a Seventh Day Adventist who could only be comforted by an Adventist familiar with Adventist beliefs on the dead, substantially different from charismatic-pentecostal teachings. The Court all but ignored Petitioner's sincerely and deeply held religious beliefs and the confusing, negative impact of the foster parents' beliefs on his daughter, H.J.

Such wrongful action by Human Services without sanction by the Court constitute wrongful interference with Petitioner's rights to raise his daughter as a Seventh Day Adventist under the Free Exercise clause.

Under Smith, the strict scrutiny test applies. By granting Petitioner a Writ of Certiorari, this Court may correct the wrongful denial of Petitioner's rights to raise his daughter according to the doctrines of his religious faith guaranteed him by the Free Exercise clause.

4. The Court violated Petitioner's due process rights by removing him as Trustee in the wrongful death case he commenced seeking damages for the death of his daughter, Joyfull, and wife, Lucy, and for injuries to his daughter, H.J.

The Court denied due process to Petitioner, natural father of his sole surviving child, H.J., by vacating his appointment as Trustee in a wrongful death action, and appointing in his stead

foster parent-Respondent Mark Dulaney, and vacating sua sponte its Order filed December 17, 1992, which had not been appealed, and for which the time for appeal had expired.

Petitioner's wife Lucy and 11-year-old daughter Joyfull died in a head-on collision on July 6, 1991, when the vehicle in which they were passengers crossed the center line, and was struck head on by a semi-trailer. Petitioner's then 8-year-old daughter, H.J., received closed-head and leg injuries in the collision. Petitioner was appointed as trustee for H.J. replacing the guardian ad litem, who had improperly obtained prior appointment as trustee, vacated by the court upon Petitioner's Motion.

Petitioner proceeded with his selection of counsel to pursue various injury claims, including third party claims against the drivers of both vehicles, underinsured claims against auto policies covering the foster parent and Petitioner's deceased wife, and other claims.

At the time of the hearing, Petitioner's counsel had obtained tentative settlement for the two policy limits covering the driver of the passenger vehicle, was suing out the claim against the semi-trailer driver, and was in the process of attempting to resolve the other pending claims.

Prior to the filing of Respondent-foster parents' Motions, the Court's initial Order had been clarified by Order of December 15, 1992, to ensure that Petitioner had full authority to resolve all claims with the various parties and insurance carriers involved. A Notice of Entry of that Order was served and filed on December 22, 1992, and never appealed. After argument and submission of briefs, the Court's Finding of Fact and Order dated September 27, 1991, as clarified by the Court's Order Appointing Trustee filed December 17, 1992, were vacated, and Respondent-Dulaneys' Motion to appoint Mark Dulaney as Trustee was granted.

Petitioner was removed from any further role as Trustee, citing Respondent-Dulaneys' status as foster parents who had now been awarded custody of Petitioner's daughter.

As natural father of deceased daughter Joyfull, Petitioner has suffered his own specific losses for her death. In addition, the divorce was not final as of the date of Petitioner's wife, Lucy's, death. The divorce decree was only filed two days later after her death. Petitioner's own claims have value, as do those of his daughter H.J., who lost her mother and sister in the fatal crash and suffered her own personal losses as well. Although the trial court cited the case of Murphy v. Bergo, 400 N.W.2d 387 (Minn. App. 1987), Murphy is clearly distinguishable on its facts. In Murphy, the Court affirmed the dismissal of a personal injury case brought by the mother of a minor child. Id at 389. The case was dismissed upon motion of the father, who gained legal and physical custody subsequent to commencement of the initial action. Between the two divorced natural parents, the Court held that the parent with legal and physical custody may, within the discretion of the trial court, maintain a lawsuit on behalf of the minor child, to the exclusion of the noncustodial parent. Id.

However, the Murphy court did not address any issue of preference between the natural parent and a legal custodian. Moreover, the Murphy court based its decision, in part, on "the interests of judicial efficiency." Id at 388. No such factors were present here. In fact, the trial court would preserve judicial efficiency by allowing Petitioner to continue as Trustee in his pursuit of all causes of action on his own and H.J.'s behalf.

Respondents requested that Petitioner be removed as Trustee of Lucy and Joyfull Johnson, yet gave no legitimate reason for the trial court to reverse its Order of September 27, 1991 or its clarifying Order of December 17, 1992. The Court had no

jurisdiction to revoke its December 17, 1992 Order, as no party moved for amended findings under Minn. Rule of Civil Procedure 59.03, and after the 15 day period expired, the Court itself had no jurisdiction to amend its own Order. No appeal was taken of that Order within 30 days as required by Appellate Rule 104.01. Absent compliance with the rules, the December 17, 1992 Order was definitive.

Minn. Stat. 573.02, subd. 3, provides that, "upon written Petition by the surviving spouse or next of kin, the Court. . . shall appoint a suitable and competent person as Trustee to commence or continue such action and obtain recovery of damages therein." Respondents argued for reversal of the previous Court order because Petitioner's "marriage relationship with Lucy Johnson had been terminated" at the time of the accident. In fact, there was technically no termination of the marital relationship prior to the date of the accident.

Furthermore, Respondents' Motion was made more than 15 months after the Court's original Order. As in his pursuit of H.J.'s causes of action, Petitioner has responsibly pursued claims arising out of the deaths of Lucy and Joyfull Johnson. Finally, the foster parents have a clear conflict of interest, as contested claims must be pursued against their own underinsured carrier and homeowners' insurer, which may not be adequately pursued, as long as Mark Dulaney is Trustee. In contrast, Petitioner has no such conflicts.

Petitioner has exclusive rights as natural father to pursue claims for his next of kin, including his own biological daughter. Petitioner was denied due process by the Court's above actions and its granting the foster parents any standing to act on behalf of Petitioner's daughter arising out of their role as foster parents. By granting Petitioner a Writ of Certiorari, the Court can correct the violation of Petitioner's due process rights to serve as Trustee

seeking to recover the losses suffered by himself and his daughter arising out of the tragic crash which took the life of his wife, Lucy, and daughter, Joyfull.

CONCLUSION

For all the above stated reasons, Petitioner urges this Court to grant a Writ of Certiorari and reverse the decision of the lower court. This Court's goal of correcting the wrong application of clear U.S. Supreme Court precedent and eliminating conflict among State appellate courts on this issue would be well served by answering these important questions.

The Court's vacation of Petitioner's appointment as Trustee wrongfully denied him of due process to pursue his legitimate role as biological father of H.J., deceased daughter, Joyfull, and surviving husband of Lucy.

Respectfully submitted this 22nd day of December, 1993.

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ATTORNEY FOR PETITIONER

STATE OF MINNESOTA
COUNTY OF DODGE

District Court--Family Division
THIRD JUDICIAL DISTRICT

Case No. F3-91-371

In Re the Custody of:	)	
	)	
H.J.,	)	
a Minor.	)	FINDINGS OF FACT,
	)	
Mark Paul Dulaney and	)	CONCLUSIONS OF LAW,
Diane LaVonne Dulaney,	)	
	)	ORDER FOR JUDGMENT,
Petitioners,	)	
	)	AND JUDGMENT.
vs.	)	
	)	
Jay Johnson,	)	
	)	
Respondent.	)	

The above-entitled proceeding for legal and physical custody of the minor child, H.J., came on for trial before the above-named Court at the Courthouse in the City of Mantorville, Minnesota, beginning on the 24th day of February, 1992 and

FILED
DISTRICT COURT-DODGE COUNTY
DATE: AUGUST 28, 1992
PAULINE J. HUSE, COURT ADMINISTRATOR

continuing through the 28th day of February, continuing again on March 16th through 19th, and March 27th, continuing again on April 7th through 9th, and continuing again on May 1st, 1992. The Petitioners appeared in person and by their attorneys, Lawrence Downing & Associates of Rochester, Minnesota, with Lawrence Downing and Jennifer McGovern in attendance. The Respondent appeared in person and by his attorney, Brian Peterson. The Guardian Ad Litem, Gail Baker, appeared in person and by her attorney, Kimball Orwoll. Dodge County Human Services appeared through its supervisor, Sheila Skeels, and by its attorneys, Dodge County Attorney's Office, with Kevin Koch in attendance.

It appeared to the Court by satisfactory proof on file that the CHIPS Petition was duly served on the Respondent on the 28th day of December, 1989, admitted by Respondent at a hearing on February 15, 1990 with subsequent dispositional hearings and orders. The Petition for Child Custody was duly served on the Respondent on the 19th of August, 1991, and was consolidated with the CHIPS proceeding by Court Order, dated September 27, 1991. Thereafter, the matter was duly noted and scheduled for trial.

The Court, after hearing the sworn testimony of the child's foster parents, Diane and Mark Dulaney; the biological father of the child, Jay Johnson; the guardian ad litem, Gail Baker; the child's therapist, Marcia Guertin; and the numerous other witnesses called by each of the parties, considering the exhibits and the arguments of counsel, and upon all the records and files herein, now makes the following Findings of Fact, Conclusions of Law, and Order for Judgment:

FINDINGS OF FACT

1. Petitioners, Mark and Diane Dulaney, were married on July 17, 1976. Diane Dulaney was born on January 24, 1957 in Mountain Lake, Minnesota and Mark Dulaney was born on

February 8, 1957 in Independence, Iowa. The Dulaneys currently reside at Route #3, Box 56, Owatonna, Minnesota, 55060, and have three children: Leah Joyce, born February 16, 1974; Melissa Ann, born January 9, 1978; and John Michael, born February 6, 1980.

2. After graduating from high school in 1975, Diane Dulaney moved to Rochester, completed an LPN training program and began working in the Respiratory Intensive Care Treatment Unit at St. Marys Hospital.

3. Mark and Diane Dulaney were married on July 17, 1976. Mark Dulaney received a technical degree in small business management, and commenced employment as assistant manager and later manager of various Phoenix Loan and Money Shoppe offices. In January of 1986, Mark Dulaney began working for McNeilus Steel in Dodge Center as Credit Manager earning approximately $33,000.00 per year plus bonuses. In August, 1979 the Dulaneys purchased their current home east of Owatonna. Mark Dulaney is currently enrolled in courses at Rochester Community College working toward a degree in accounting.

4. In 1982, the Dulaneys began participating in the Dodge County foster parents program and within weeks received the first of the approximately fifteen children that they have cared for over the past ten years.

5. Respondent, Jay Johnson, was born on March 23, 1949. Mr. Johnson completed one year of junior college and one year at UCLA before leaving in 1969 to travel through Europe and the Far East for several years. During his travels, Mr. Johnson was not employed, but lived off of a $10,000.00 inheritance from his mother and the largesse of people whom he met while traveling. In 1972, Mr. Johnson stopped in Hawaii to visit a friend and finding that he liked it, settled there.

6. While at UCLA Mr. Johnson studied yoga and comparative religion and began to practice a very strict vegetarian diet. While traveling, Mr. Johnson studied different religions, finally deciding in March 1974 to adopt the Seventh Day Adventist faith as the closest organized religion to his own personal philosophy.

7. Mr. Johnson's work history in Hawaii consisted of various self-employed handyman projects, short term employment for others and earning his rent by working for his landlord while growing his own food. After leaving Hawaii with his family in 1988, Mr. Johnson did some church-sponsored work in British Columbia. After moving to Minnesota in October 1988, he worked as a handyman. Later, he worked at Lin's Iron in Dodge Center from November 1988 until he left for Texas in October 1989 to "help out" some friends for his room, board, telephone bills and a few hundred dollars of cash. When Mr. Johnson returned to Hawaii, he commenced full-time employment at Panda Ranch where he claims to be still employed, despite the fact that he has not resided in Hawaii since July of 1991. Since returning to Minnesota in July 1991, Mr. Johnson has again been doing odd jobs for room and board, and received cash earnings of approximately $300.00 to $400.00 per month.

8. Mr. Johnson married Lucy Teberg (now deceased) in September of 1976, four months after meeting her on the island of Molokai. Lucy had a history of mental illness and, as he was aware, had been hospitalized before meeting him. Early in their marriage, she also began practicing the Seventh Day Adventist religion.

9. Two children were born during the Johnson's marriage: J.J., born on May 28, 1979; and H.J., born on September 6, 1982. Lucy Johnson was the primary caretaker of the children

during the children's early years in Hawaii. On at least six occasions, the Johnsons placed one or both children in the homes of friends or family due to stressful situations caused by Lucy Johnson's mental instability and Mr. Johnson's attempts to deal with his wife's mental illness himself. These placements lasted from a few days to three months, usually as long as their mother was unable to care for the children.

10. The Johnsons used corporal punishment to discipline their children. When the children were "disobedient" from time to time, they were subjected to the following severe methods of discipline:

a. Spanking with a stick, wooden spoon or switch with their dresses pulled up and panties pulled down;

b. Upon crying, their mouths and nose were covered by one of the parents to prevent the children from breathing until they stopped crying;

c. One parent would restrain the child not receiving punishment from helping her sister; and

d. Withholding of meals which, because the Johnsons only ate two-meals a day with no between meals snacks, meant a full 24 hours, from breakfast on one day to breakfast the next day, without nourishment.

Mr. Johnson seemed to recognize that on occasion his wife was punishing the children inappropriately while mentally disturbed, but did not effectively intervene for the children's safety. On a number occasions he engaged in the punishment at her request and

on his own volition.

11. At Lucy Johnson's request, the family left Hawaii in May of 1988 travelling first to California, then throughout the western United States, British Columbia, Canada, and eventually coming to Minnesota in October of 1988.

12. When first in Minnesota, the Johnsons lived with another Seventh Day Adventist family, the Jacobson's, for three turbulent and stressful months during which time, the Jacobson's observed punishment of the Johnson children by their parent's which constituted physical and emotional abuse, withholding and restricting the types and amounts of food, and bizarre and strange behavior by Mr. Johnson toward his wife and children which led Mr. Jacobson to ask the Johnsons to leave. Mr. Johnson asked the Jacobson's to care for the children to allow him to assist his wife, but Mr. Johnson refused to give them full custody of Joy and Hope because "they were [his] children." The Johnsons moved out, first to an apartment and then into a house purchased for them by Mr. Teberg.

13. During the next six months, the stress level in the Johnson home escalated. Members of the Johnson's Seventh Day Adventist Church had grave concerns about the safety of the children, as the evidence of physical and emotional abuse became more serious, observing nicks on the children's noses, hearing screaming, seeing the children hiding from their father, and listening to the children reporting other abuse. Members of the church unsuccessfully counseled with the Johnsons to assist them with their situation. The Johnsons asked several members of the church, including Marnell and Maryann McNeilus, the Steve Dickie family, and Barry and Marybeth Mosier to care for their children. Finally, in September 1989, when the stress, chaos and violence finally apparently overwhelmed them, the Johnsons'

placed their two girls with Ron and Linda Christenson.

14. In September of 1989, the Dodge County Department of Human Services, hereinafter referred to as "DCDHS," became involved with the Johnson family, responding to several reports of neglect and abuse. The initial assessment was handled by social worker Laura Pettey, who on September 14, 1989, went to the home of Mr. and Mrs. Christenson to interview J.J. and H.J.

15. When Ms. Pettey spoke with J.J. about why she was staying with the Christensons, J.J. reported the following:

a. Her mom and dad argued a lot;

b. Her mom hit her hard across the side of the head with an open hand for no reason;

c. Her dad spanked her with an open hand or a stick, both with her pants on and off;

d. When she cried, her dad pinned her on the floor covering her nose and mouth so that she could not breathe. She would then kick him and he spanked and covered her nose and mouth even more;

e. Her parents also hit her sister, H.J., and "hurt her a lot;"

f. When her dad took H.J. upstairs to be spanked, her mom restrained her downstairs so she could not help H.J. and spanked her for trying to help;

g. Because she was bigger than H.J. she could take it more, but H.J. got really hurt;

h. She did not feel safe living at home with her parents and wanted to live at the

Christenson home "forever;"

i. They had previously lived with the Ben Turner family in Hawaii for about a year;

j. They only ate two or three meals a days consisting mainly of fruit, nuts, beans, vegetables, soy milk, and a mixture of almonds with honey, did not get milk often and drank mostly water; and

k. If she was bad she did not get breakfast, often went to bed hungry, and was not allowed to snack.

16. When Ms. Pettey spoke with H.J. about why she was staying at the Christenson home, H.J. reported the following:

a. Her mom and dad were "fighting and arguing," and hit each other;

b. Her parents hurt her by hitting her all over her body with a closed fist for every little reason and her dad spanked her two times a week with her pants down using a closed fist;

c. When she cried, her dad pinned her down on the floor and covered her mouth so that she could not breathe. When she kicked him, he covered her mouth even more;

d. Her dad almost killed J.J. once; he sat on J.J.'s leg and almost broke it;

e. If either child tried to help the other one, they both "got it;"

f. Once J.J. recorded one of these episodes, her mom and dad got really mad and threw it away;

g. One time she and J.J. lived with another family for about one year;

h. Her mom and dad were poor, so they do not get much to eat. She never ate supper, for breakfast or lunch ate fruits or vegetables, and hardly ever drank milk; and

i. When sick, she went to a "different kind of doctor" and had either a hot or cold foot bath.

17. Ms. Pettey then spoke privately with Mr. and Mrs. Christenson, who reported:

a. Mr. and Lucy Johnson were having financial problems creating a great deal of stress between them;

b. Mr. and Lucy Johnson had "WWIII fights" over everything, even when talking on the telephone with J.J. and H.J.;

c. Lucy Johnson had been in a mental hospital for about one year, so another family took care of J.J. and H.J.;

d. When the children saw their father, they hid on the floor of the car, sucked their thumbs, and curled up in a fetal position;

e. H.J. wore diapers to bed because she wet her pants every night; and

f. J.J. had gained eight pounds since she started staying at their home two weeks before;

18. On the Protective Intervention Assessment Ms. Pettey reported that the children were at intermediate or high levels

of risk for severe neglect and abuse because of excessive physical punishment, their parents being unable to meet their minimum food requirements, placement outside of the home, marital stress and discord, possible mental illness of one or both parents and frequent moves. Intervention was determined to be necessary and DCDHS had Mr. and Mrs. Johnson sign a Voluntary Placement Agreement regarding their children on September 22, 1989.

19. With the input of both parents, a Plan of Protective Services was prepared on October 9, 1989, setting forth specific actions required to be taken by Mr. and Lucy Johnson in order to have their children returned to them, which were as follows:

a. Complete psychological evaluations and follow any recommendations;

b. Resolve their marital conflict;

c. Provide financially for their children;

d. Provide adequate food and care; and

e. Meet the medical needs of the children.

Mr. Johnson signed the plan on November 29, 1989.

20. While the children were staying with the Christensons, the disputes and violence between the Johnsons increased. Each of the Johnsons contacted the Christensons, wanted to stay with them, wanted them to referee and intervene in their disputes, and involved the Christensons in their conflict. Mrs. Christenson was overwhelmed by the Johnson family problems, was afraid of Lucy Johnson and her behavior, was expecting another baby in the very near future, and could not handle the continuing stress. Therefore, on October 9, 1989, Mr. Christenson contacted DCDHS with these concerns.

21. Because of the Christenson's growing reluctance to continue to care for the Johnson children, Ms. Pettey decided to place the children in licensed foster care. Ms. Pettey notified Lucy

Johnson of this decision on October 11, 1989, and Lucy Johnson agreed to voluntarily place the children in foster care until she could provide the necessary shelter, food, clothing, and transportation for her children. At about this same time, the Johnsons separated with Mr. Johnson leaving Minnesota for Texas on October 13, 1989, after being informed that the children were being placed in foster care by DCDHS.

22. On October 13, 1989, Ms. Pettey and another social worker, Jill Yentsch, moved the children from the Christenson's to the Dulaney foster home. While initially reticent, the children were quite talkative and did not resist.

23. On the evening of October 15, 1989, while crying and sucking her thumb, H.J. reported the following to Diane Dulaney:

a. Her father spanked her;

b. She did not want to see her father;

c. Her father had "100s of rules" and because she could not read, she could not follow all of the rules; and

d. Her father hit her and J.J. and "could kill them."

Later, both children told Diane Dulaney that if they hid when Mr. Johnson wanted to spank them, they were not allowed to eat breakfast or lunch, they almost never ate supper and when they cried because they were hungry, they were not allowed any food.

24. On October 16, 1989, Mr. Johnson contacted Ms. Pettey by telephone, but did not provide a telephone number or address where he could be reached, telling her only to contact Mr. Christenson to get in touch with him and he would call her back.

25. Well aware of the Johnson's religious beliefs, DCDHS worked with the Seventh Day Adventist Church in the

following ways to accommodate the Johnson's religious practices during the children's foster placement:

a. Both Diane Dulaney and Laura Pettey met the pastor and other members of the church to learn more about the Seventh Day religious practices and dietary restrictions;

b. Diane grocery shopped at several different stores in order to provide the appropriate and necessary foods to try to meet the children's prior dietary restrictions;

c. She further accommodated the children's special dietary restrictions by preparing vegetarian meals for J.J. and H.J. from recipes she read and received from church members, while continuing to prepare regular meals for her own family;

d. J.J. was picked up by church members Monday through Friday to attend Strawberry Meadows, a Seventh Day Adventist School;

e. The children were picked up by church members to attend Saturday morning worship services;

f. DCDHS provided supplemental funds to the Dulaneys to purchase appropriate food for the children.

26. H.J. and J.J. settled into the Dulaney home easily. During the first few months the children did not exhibit any behavior evidencing that they missed their father. For example, the children showed no interest in reading postcards or letters sent to

them by Mr. Johnson except to look at the pictures, and continued to state that they did not want to be alone with their father. H.J. continued to wet the bed.

27. On November 9, 1989, DCDHS filed a CHIPS petition in Dodge County District Court against both parents alleging that the children were in need of protection or services within the meaning of Minnesota Statutes Section 260.015, Subd. 2a:

> (1) in that the children were abandoned or without parent, guardian, or custodian;
>
> (2) in that the children had been victims of physical or sexual abuse or reside with a victim of domestic abuse as defined in subdivision 24, or is a victim of emotional maltreatment as defined in Section 260.015, subdivision 5a;
>
> (3) in that the children were without necessary food, clothing, shelter education or other required care for the children's physical and mental health or morals because the parent's parent, guardian or custodian is unable or unwilling to provide that care; and
>
> (4) in that the children were without proper parental care because of the emotional, mental, or physical disability of the children's parent, guardian, or other custodian.

28. In November of 1989, the children were evaluated by Marcia Guertin of Zumbro Valley Mental Health Center in Rochester, Minnesota. In her initial evaluation of H.J., Ms. Guertin found physical and emotional abuse by H.J.'s parents, a history of mental illness in the family which led to placement of the children with several different families over the years because of the parent's inability to handle stress and parent the children,

regressive responses of bed wetting and thumb sucking, difficulty adjusting to the separation from her parents, nervousness and fear most of the time, clinginess to and bonding with her foster mother because of fear of the insecurity in her life. The diagnosis she made was adjustment disorder with mixed emotional features. Therapy was recommended both on an individual and a family basis, including J.J., with the evaluation process anticipated to take several sessions due to H.J.'s anger and fearful attitude. During the early therapy sessions, the children did not voluntarily discuss their parents, spoke very little about their mother when asked and refused to discuss their father.

29. In February of 1990, Mr. Johnson returned from Texas for his initial court hearing on the CHIPS Petition. Mr. Johnson admitted two sections of the petition, Minnesota Statutes Section 260.015, Subd. 2a:

> (2) in that the children had been victims of physical or sexual abuse or reside with a victim of domestic abuse as defined in subdivision 24, or is a victim of emotional maltreatment as defined in section 260.015, subdivision 5a; and
>
> (8) in that the children were without proper parental care because of the emotional, mental or physical disability or sate of immaturity of their parent, guardian or other custodian,

admitting that he spanked the children using a wooden spoon, on at least one occasion having broken a wooden spoon while spanking the children, and covered their noses and mouths with his hand so that they could not breathe when they cried.

30. The resulting Court Order, dated February 20, 1990, granted DCDHS conditional protective supervision of the children; ordered supervised visits with both parents as arranged by

DCDHS; directed the foster parents to monitor telephone calls; required Mr. and Mrs. Johnson to complete psychological evaluations at Zumbro Valley Mental Health Center; and directed that the matter be reviewed in two months.

31. While in Minnesota, Mr. Johnson requested visitation with J.J. and H.J. When the children were told that their father was there and they could visit him, they both cried, were very afraid, and wanted Mark Dulaney to protect them. J.J. refused to see her father and H.J. was willing to go only for a half hour visit as long as Diane Dulaney was with her. The social worker, Ms. Pettey, and Mr. Johnson's sister from California, Susan Cotton, were also present at this visit. During the visit there was very little interaction between H.J. and her father, with most of the interaction being between H.J. and her aunt. H.J. sat on Diane Dulaney's lap clinging to her, was very squirmy and nervous, and giggled frequently.

32. Mr. Johnson was tested at Zumbro Valley Mental Health Center on February 22 and 23, 1990 by J. Larry Smith, M.S., licensed psychologist for a psychological evaluation and assessment of his parenting abilities. The evaluations included clinical interviews, completion of the MMPI-II and the adult-adolescent parenting inventory by Steven Bavolek, and review of information received from DCDHS and the guardian ad litem. Mr. Smith reported that Mr. Johnson's parenting inventory showed a verbal knowledge of appropriate child development and the effects of discipline, which seemed incongruent with the "hundreds of rules" the family had to live under. The MMPI test results were of questionable validity showing Mr. Johnson to be unrealistically virtuous, unwilling to disclose personal information, too guarded, viewing himself as well adjusted, with difficulty expressing anger which may be handled in an indirect manner.

Mr. Smith found Mr. Johnson to be an emotionally distant, very guarded individual with personality difficulties involving rigidity and passive aggressiveness. Mr. Johnson projected responsibility for his and his children's problems onto others, particularly his wife, refused to accept that his own behavior might effect others, minimized and denied any abusive behavior toward his children or wife and showed no open concern for his children. Because of these attitudes, Mr. Smith found that Mr. Johnson could not provide a warm nurturing environment for raising children and did not possess adequate parenting abilities.

33. During the first six months that the children were living with the Dulaneys, Lucy Johnson, separated from her husband, changed her dietary habits and began eating foods which had not previously been part of the Johnson family diet, such as turkey at Thanksgiving. On visits with her daughters, she also introduced J.J. and H.J. to these new foods. This led the children to request things such as pop and cheese at the Duleney's home, and eventually to stop wanting to eat the strict vegetarian meals that Diane Dulaney prepared for them, instead wanting to eat the meals she was preparing for the rest of the Dulaney family. After discussions between the Dulaneys, Lucy Johnson and DCDHS, it was agreed to discontinue the vegetarian meals and allow the children to eat regular meals.

34. Within the first six months of placement, Diane Dulaney began to have growing concerns about the children's education. J.J. began having disciplinary problems at Strawberry Meadows school and on March 5, 1990, was sent home because of "a bad attitude" with the school requesting that they be allowed to use corporal punishment on J.J. and that Diane Dulaney similarly discipline J.J. at home, which she felt uncomfortable doing. Ms. Dulaney also had concerns about the age appropriateness of the

curriculum based on materials J.J. was supposed to study that were at a high school or adult level instead of second grade. She discussed her concerns with Laura Pettey and the guardian ad litem.

35. The children were tested at the Claremont (Minnesota) public school to ascertain their functioning levels and individual educational needs. The test results indicated some educational deficits, that J.J. should be placed in the fourth grade and H.J. in the first grade. At that time, J.J. was in second grade at the age of ten and H.J., not yet enrolled in school although she was seven years old, was being home-schooled by Diane Dulaney. The guardian ad litem met with Maranatha Seventh Day Adventist School and Claremont public school personnel, and compared the curriculum, class size, facilities, and disciplinary methods employed by each school.

36. Since placement, H.J. had ongoing medical problems, including frequent sore throats, a runny nose, and ear aches. On Ms. Dulaney's initiative, H.J. was seen by the Mayo Clinic in Kasson, Minnesota. A specialist, Dr. Neel recommended the possibility of tonsillectomy surgery if her health did not improve.

37. Prior to the next scheduled hearing, Mr. Johnson returned to Minnesota and requested visitation with J.J. and H.J. On Sunday, April 22, the guardian ad litem supervised a visit between the children and their father. The visit went fairly well. Mr. Johnson gave the children presents from Hawaii, Mr. Johnson showed the children where he was staying at the "Grand Olde Mansion," and finally they all went to Oxbow Park, near Byron, Minnesota. At Oxbow Park, the children and Mr. Johnson interacted well, played together, Mr. Johnson walked on his hands, and they laughed a lot. At one point, the children and Mr. Johnson

went into the woods out of the guardian ad litem's earshot for several minutes. After Mr. Johnson was dropped off, the children were very upset and stated, "Don't ever leave us alone with him again, he said bad things about our mom."

38. A dispositional hearing was held on April 23, 1990, where DCDHS and the Guardian ad litem recommended continued foster placement and counseling, that the children be enrolled in public school, and requested authorization to allow surgery for H.J. if recommended by Dr. Neel in the future. Mr. Johnson was present at the hearing, was represented by counsel, Neil Simonson, and the Court after hearing the arguments of all parties ordered:

a. Custody of the children of the children was to remain with DCDHS;

b. J.J. and H.J. were to continue counseling at Zumbro Valley Mental Health Center;

c. The guardian ad litem was allowed to authorize the transfer of the children to public school after evaluating the timing of the transfer, whether immediately or the next school year;

d. If her physicians determined that H.J. needed surgery, they were to provide a letter to the Court explaining that need which would be forwarded to the parents, DCDHS and the guardian ad litem for review. DCDHS or the guardian ad litem would then contact the parents to request their consent to the surgery and if they did not consent, an expedited emergency hearing would be held. If the physician

determined a life threatening condition, surgery could be performed without parental consent;

e. Mr. Johnson was to participate in counseling and any other mental health services recommended by DCDHS and Hawaiian Social Services;

f. Mr. Johnson was to participate in group counseling for persons who have abused their children and attend parenting classes;

g. Mr. Johnson was to have regular visitation as arranged by DCDHS; and

h. Mr. Johnson was to provide financially for his children.

39. On April 24, 1990, the children had a visit with their father at the Dulaneys. During the visit, J.J. leaned on and snuggled up to Mark Dulaney and got up into Diane Dulaney's lap and curled into a fetal position. Although H.J. acted less nervous around her father.

40. Pursuant to Court Order, Ms. Pettey contacted Hawaiian Child Protection Services, hereinafter referred to as "HCPS," for parenting and counseling referrals for Mr. Johnson and in May 1990, Mr. Johnson began participating in parenting classes through the "Alternatives to Violence" program on Molokai and counseling with both Glenn Izawa and Harriet Crofts Nathan.

41. By letter dated June 26, 1990, Glenn Izawa reported that after counseling individually with Mr. Johnson for five one-hour sessions, Mr. Johnson was a stereotypical abusive man, i.e. rigid in his thinking, blaming his wife for his difficulties, and minimizing and denying responsibility for his abuse of his

wife and children. Mr. Izawa reported that Mr. Johnson became visibly disturbed when forced to focus on himself and his issues, preferring to give superficial answers, and that he lacked any awareness of control issues and confrontations that resulted from them with his wife and children.

42. By letter dated July 3, 1990, Ms. Guertin reported that the children were more trusting and at ease in the therapy process. H.J. was concerned about what her parents, especially her father, thought, for example, attendance at public school about which she was excited, but of which she knew her parents disapproved. She reported that H.J. was influenced greatly by J.J. and speculated that H.J. had more difficulty dealing with situations where her parents took one stance and social services, her foster parents, or others took a different stance.

43. A review hearing was held on July 9, 1990, at which Mr. Johnson did not personally appear although he was represented by counsel, Neil Simonson. The Court adopted the concerns of DCDHS about Mr. Johnson: that "even though he was attending counseling, he had yet to deal with the issue of abuse," and that "the girls had a strained relationship with their father." The Court also followed the recommendations of DCDHS: continuing custody of the children with DCDHS and all other provisions of the previous Court Order.

44. In September of 1990, Ms. Guertin commenced family therapy with J.J., H.J., and Lucy Johnson toward the goal of reunification of Lucy Johnson with her daughters. The sessions focused on Ms. Johnson better understanding her children and their needs, and her feeling more comfortable in a parenting role. Ms. Johnson had difficulty disciplining the children and setting limits in part because J.J. would often step in to "parent" and set limits for H.J. complicating her mother's efforts to resume parenting.

45. In a therapy session on October 3, 1990, the children discussed a Christmas visit to Hawaii. On October 10, 1990, Ms. Johnson told Ms. Pettey that Mr. Johnson wanted the children to visit him in Hawaii and she would supervise the visit.

46. By letter dated September 20, 1990, Mr. Izawa reported that in his continued therapy with Mr. Johnson, he had seen no significant change in Mr. Johnson's attitudes and beliefs concerning his abusive behavior toward his wife and children, continuing to minimize the seriousness of his abuse, blame his wife for the children's behavior difficulties and deny responsibility for the Johnson family chaos consistent with previous evaluations. Mr. Izawa reported that because Mr. Johnson rationalized his behavior and actions through his religion, significant change would be difficult and would require an extended amount of time. Mr. Izawa refused to excuse Mr. Johnson's abusive behavior because of Mr. Johnson's religious beliefs. Mr. Izawa recommended more confrontive counseling in order for Mr. Johnson to understand the impact of his abuse on his wife and children and help him develop a sense of when restraint and guidance cross the line and become domination and control.

47. In her letter dated September 20, 1990, Harriet Crofts Nathan reported that Mr. Johnson had completed attending the parenting education classes, had been involved in individual counseling and had attended abusive parent group therapy sessions, but despite that had "missed the point of his 22 hours of class," which focused on developing self control in, as opposed to exerting external control over, children. Ms. Nathan reported that Mr. Johnson's religious beliefs prevented him from committing himself to nonviolent disciplinary methods, pointing to the child rearing philosophy Mr. Johnson relied upon as dogmatic, directive and harsh, increasing her concern that Mr. Johnson's religious beliefs

were in conflict with normal human behavior. She also reported that he must modify those beliefs in order for his children to live with him safely, and that if he did not, his children would continue to be in danger. Ms. Nathan was not optimistic that Mr. Johnson could change his beliefs.

48. A review hearing on the CHIPS file was held on October 24, 1990, and Mr. Johnson appeared with counsel, Neil Simonson. The Court, DCDHS and the guardian ad litem had continuing concerns about Mr. Johnson's lack of progress in his individual therapy, the Alternatives to Violence group therapy, and his relationship with J.J. and H.J. The Court accepted the recommendations of DCDHS, ordered continued custody of the children with DCDHS, and continued all other aspects of the previous Court Orders.

49. While in Minnesota, Mr. Johnson also had several supervised visits with J.J. and H.J.

50. In October of 1991, Lucy Johnson commenced marriage dissolution proceedings against Mr. Johnson requesting custody of the parties' two minor children, J.J. and H.J. Mr. Johnson made no formal response to her Petition.

51. On November 14, 1990, Mr. Johnson requested that J.J. and H.J. visit him in Hawaii during Christmas vacation. After discussions with the children and their therapist, Ms. Guertin, DCDHS and the guardian ad litem approved a supervised visit, but because of transportation and communication problems, the visit had to be postponed.

52. In December 1990, Mr. Johnson discontinued his counseling with Mr. Izawa and Ms. Nathan because of alleged "religious differences."

53. On December 6, 1990, a meeting was held with Ms. Johnson, Ms. Pettey, the guardian ad litem, Ms. Guertin and

the children to discuss treatment goals and expectations and an expanded visitation plan for reunification of the children with Ms. Johnson in the near future. A plan was devised that gradually increased the children's time with their mother from one night to two, three, four and finally five nights, anticipating that if the increased visitation went well, the children would be returned to their mother in mid-April or May of 1991.

54. As the visitation between the children and their mother increased, although Ms. Johnson and the children reported their contacts going well, difficulties occurred. Ms. Johnson continued to have problems setting limits and appropriately disciplining the children; she related to the children as a peer rather than a parent. H.J. had attachment and separation problems. For example, in her December 20, 1990 session H.J. was concerned that Diane Dulaney loved John and Melissa more than she loved her and J.J., and H.J. did not believe that her mother loved her as much as Diane loved her children. H.J. continued to wet the bed and was acting out more frequently.

55. In January 1991, Ms. Pettey approved a supervised visit to Hawaii for J.J. and H.J. with Diane Dulaney to act as supervisor. Mr. Johnson purchased plane tickets, provided a detailed agenda and itinerary for the children and Diane Dulaney prior to their departure (including where they were to stay, who they would visit and see and when), planned activities and events which were approved by DCDHS. Arrangements were also made with Wendy Beckett of HCPS for Diane Dulaney to contact her daily so she could monitor the visit.

56. Prior to the Hawaiian visit, H.J.'s acting out behavior began escalating, which Ms. Guertin testified could have been due to H.J.'s fear that Diane Dulaney did not love her anymore or because H.J. was frightened about the upcoming

Hawaiian visit with her father. Ms. Guertin encouraged Diane to continue to set limits for H.J., talk to her about her feelings, and reassure H.J. that she was safe, secure and nothing was going to happen to her.

57. The guardian ad litem met with J.J. and H.J. before the Hawaiian visit, and they expressed fear that their father might "kidnap" them while they were in Hawaii.

58. The children and Diane Dulaney left for Hawaii on February 5, 1991. When she and the girls arrived, they were met by Mr. Johnson and his parents, brother Brian, and friends from his church. There was a full agenda of things to do every day and they were very active hiking to falls, walking along river beds and the beach, "boogie-boarding" and snorkeling in the ocean, and even going on an airplane tour of the island. The visit seemed to go well and everyone had fun.

59. In Hawaii Diane Dulaney had a chance to observe Mr. Johnson in his own environment and was impressed with the beauty of Hawaii, the supportive friends and family Mr. Johnson had there, and the living situation that J.J. and H.J. would have there if they returned. Diane Dulaney saw a different situation than she had apparently expected, and observed that the physical environment was adequate for J.J. and H.J.

60. Diane Dulaney and Mr. Johnson also had several discussions about the circumstances leading up to the placement of the children, Mr. Johnson's current relationship with his children and what Mr. Johnson needed to do to have J.J. and H.J. returned to him.

61. On February 13, 1991, Diane Dulaney and Mr. Johnson met with Reverend Harold ("Rocky") Roberts, a new counselor Mr. Johnson had selected because of his religious orientation, and had a similar discussion about concerns she,

DCDHS, the guardian ad litem and the Court had about Mr. Johnson's attitude and behavior. After that meeting Diane Dulaney was encouraged about both Reverend Robert's understanding of the situation and the possibility that Mr. Johnson might make progress in counseling with him.

62. On February 13, 1990, Mr. Johnson also called Ms. Sheila Skeels, DCDHS supervisor, asking to extend the children's visit. When Ms. Skeels refused to do so, Mr. Johnson became very angry, accused DCDHS of being guided by a very mentally ill woman (his wife), and threatened to file lawsuits against the agency, the county, and the State of Minnesota.

63. On the evening of February 13, 1991, Mr. Johnson and his friends, Tommy and Kathy Larson, confronted Diane Dulaney to try to convince her to return to Minnesota alone and leave J.J. and H.J. in Hawaii with Mr. Johnson. They were very insistent and only dropped the matter when Diane Dulaney promised to call her husband to discuss the situation.

64. On February 14, 1991, Diane Dulaney, Mr. Johnson and J.J. and H.J. met with Wendy Beckett of HCPS. Mr. Johnson brought up the possibility of the children remaining in Hawaii and Ms. Beckett telephoned Ms. Skeels in Minnesota requesting that the children be allowed to remain in Hawaii, and if not, what she could do to effectuate the quick return of the children. While making the request, Ms. Beckett made it clear that Mr. Johnson was not able at that time to have full-time care of his children because he did not have a home. Ms. Skeels insisted that the children return as planned and when back in Minnesota, an assessment would be done on the current situation and what was best for the children.

65. The children were returned to Minnesota with Diane Dulaney as planned.

66. On February 19, 1991, Ms. Skeels and Carol Stensrud, another social worker on the case, met with Ms. Dulaney at her home to discuss the trip to Hawaii. Diane Dulaney detailed their activities, the people that she had met while there, and stated that if she had to choose right then between reunification with either of the parents, her suggestion would be that the children return to Hawaii and live in foster care there so that they can try to establish a relationship with their father because Mr. Johnson appeared more stable than Lucy Johnson.

67. After their trip to Hawaii, the children told Ms. Guertin, the guardian ad litem, the social workers, and the Dulaneys that, although they enjoyed visiting Hawaii because of its beauty, warmth and activities, they did not want to live with their father.

68. A meeting was held on March 20, 1991, with Mr. and Diane Dulaney, the guardian ad litem, a new social worker (Ms. Cindy Hilleshiem), Ms. Skeels, and Ms. Guertin to discuss the status of the expanded visits and reunification of the children with Lucy Johnson. Because of continuing discipline and control problems, it was decided to limit and monitor contacts, particularly overnight visits, between Ms. Johnson and the children, to allow Lucy Johnson time to stabilize in her own therapy and reassess her and the children's needs. Ms. Guertin's involvement was decreased to her providing consultation to the foster parents and seeing the children only on an as needed basis.

69. In response to Mr. Johnson's request for the immediate return of the children to him in Hawaii, Ms. Pettey requested additional information from both HCPS and Rev. Roberts by telephone, letter and fax. Despite these requests, DCDHS received no written reports from Hawaii on Mr. Johnson and his progress before the next scheduled review hearing, April

17, 1991.

70. Finally on April 16, 1991, Ms. Skeels spoke with Rev. Roberts about Mr. Johnson's progress in counseling, as Rev. Roberts had been seeing Mr. Johnson on an almost weekly basis from sometime in December of 1990 through March 10, 1991, when Rev. Roberts left Hawaii for an extended visit to the mainland. Rev. Roberts described Mr. Johnson as an independent, intelligent, motivated individual living an extreme lifestyle. He saw Mr. Johnson as stubborn with a tendency to make his children conform to a very narrow definition, and as not ready to parent his children until he took ownership for their situation and learned to let others, including Rev. Roberts, provide input and guidance in his life.

71. A review hearing on the CHIPS petition was held on April 17, 1991. Mr. Johnson was not present, but was represented by his counsel, Neil Simonson. Again DCDHS indentified the continuing problems with Mr. Johnson's refusal to accept responsibility for the removal of the children from his home, lack of progress in counseling, and continued strained relationship with his children, and recommended the continuation of the previous Court Orders, with the exception that Rev. Roberts was named as Mr. Johnson's new counselor and requested to provide updates on Mr. Johnson's counselling progress to the Court.

72. The children continued to have regular monitored visitation with their mother. It had been decided that in order for visitation to be increased, Lucy Johnson needed to have three consecutive "good" visits with the children. A "good visit" was clearly defined for Ms. Johnson to be determined by DCDHS, with input from the guardian ad litem and the volunteer from the Exchange Club, who were to monitor visits by dropping and

checking in with Lucy Johnson during her visits. While the quality of the visits varied from the end of May on, the visits were improving and everyone was optimistic that longer overnights would be allowed by mid-July.

73. The final hearing on the Johnson marriage dissolution was held on June 27, 1991. Mr. Johnson still had not answered the Petition, nor did he appear at the hearing. The dissolution Judgment and Decree was signed by the Court on July 3, 1991, with the issue of custody of the minor children being deferred to the juvenile court for resolution of the CHIPS proceeding. Judgment was entered on July 8, 1991.

74. On July 6, 1991, Lucy Johnson picked the children up at 8:00 a.m. for her scheduled weekend visitation. Around 4:00 p.m. the Dulaneys were notified of an automobile accident in which Lucy and J.J. Johnson were killed and H.J. was seriously injured. H.J. was taken by ambulalance to St. Marys Hospital in Rochester.

75. H.J.'s injuries included a fracture to the growth plate area on the head of her right tibia, a laceration to her right hand, and prominent bruises on her right hip. Diane Dulaney remained with H.J., who that night constantly asked where her mom and J.J. were, but because she had been instructed at that point not to say, Diane told H.J. they were in another building.

76. The following morning, because she was the closest person to H.J., Diane was asked to tell H.J. about her mother and sister's deaths. H.J. cried out, threw her left arm around Diane, and said, "I just knew they died."

77. Mr. Johnson was notified of the accident, came to Minnesota on July 7, 1991, and went immediately to the hospital to see H.J. Upon arriving at the hospital, Mr. Johnson stated that he would be taking H.J. back to Hawaii to live with him when she

was released from the hospital and that he would achieve that goal.

78. Ms. Hilleshiem met with Mr. Johnson the next day, July 8, 1991, to discuss the situation, and reminded him that DCDHS had formal custody of H.J., explained to him that H.J. was upset and grieving at that time, that the thought of going to Hawaii was upsetting her even more, and requested that Mr. Johnson not discuss returning to Hawaii with H.J. until a decision was made in the future. Mr. Johnson continued to discuss H.J.'s return to Hawaii. Because of that and his threats to take H.J., only supervised contacts were allowed between H.J. and Mr. Johnson thereafter.

79. Successful reduction surgery was performed on H.J.'s right leg on July 8, 1991. H.J. was released from the hospital on Wednesday, July 10, 1991, to the Dulaney home. The formal visitation for Lucy and H.J. Johnson was held that evening, and the funeral service was conducted the next day. H.J. attended both.

80. Because of the trauma of the accident, the deaths of her mother and sister, and her father's return and immediate and persistent request for custody and her return to Hawaii, H.J.'s emotional state was very fragile and her emotional needs were actually much greater than her physical needs.

81. H.J. was on crutches for one month and had frequent physical therapy in Owatonna. Although at times difficult because of H.J.'s emotional state, Diane Dulaney made sure that H.J. went to each scheduled appointment. Because the fracture was on the growth plate and the bone could grow on one side, but not the other, or not grow normally at all, H.J. will need regular checkups every three to six months for six to eight years with x-rays to monitor the bone growth.

82. Mr. Johnson requested daily visits with H.J. which were arranged through DCDHS. From the beginning, H.J. was apprehensive about these visits with her father, wanting Diane Dulaney to be present at all visits. H.J. clung to Mrs. Dulaney and had very little interaction with Mr. Johnson. Shortly after the funeral, H.J. began complaining and refused to visit with her father.

83. Ms. Guertin met with H.J. to help her cope with the deaths of her mother and sister. H.J. did not initially want to talk about her sister and mother, appearing somewhat distant from any painful emotions, but later opened up, discussing the accident itself, her emotions about it, and certain survivor issues.

84. By a letter dated July 15, 1991, Ms. Guertin addressed the issue of H.J. returning to Hawaii with her father: strongly recommending that H.J. not be removed from the Dulaneys because of her intense psychological bond with them and stating that to sever that relationship then would be detrimental to H.J.'s emotional well-being and her integration and healing from the deaths of her mother and sister.

85. On July 17, 1991, Ms. Hilleshiem, Ms. Baker, and Rev. Roberts met to discuss Mr. Johnson's counseling progress and current parenting abilities, and H.J.'s needs. Ms. Baker and Ms. Hilleshiem expressed their concerns about Mr. Johnson's lack of contact with H.J., lack of documented counseling progress, H.J.'s fear of and feeling of abandonment by her father, strong attachment to the Dulaneys, lack of and strained relationship with her father and how best to deal with it, and Mr. Johnson's lack of empathy for H.J. and refusal to accept responsibility for H.J.'s initial placement or their current strained relationship. Because there had been no written reports from Rev. Roberts or any other professionals working with Mr. Johnson since December of 1990

and only sporadic telephone updates from HCPS and Rev. Roberts in February and April 1991, DCDHS was unsure what, if any, counseling Mr. Johnson had actually done. Rev. Roberts explained the results of a "National Christian Counselors Association" evaluation he had given Mr. Johnson and personal investigation that he had done in Hawaii to assess the accuracy of the allegations against Mr. Johnson and his parenting skills, producing the test results and several completed questionnaires he had received back concerning Mr. Johnson. While the questionnaire responses were generally positive about Mr. Johnson's parenting abilities, they were of little or no value because some of the respondent's had never seen Mr. Johnson in a parenting situation, and those that had such experience had not done so for over two and one-half years. Rev. Roberts seemed to recognize and understand H.J.'s fragile emotional state, her attachment to the Dulaneys, and the possible effect returning to Hawaii with her father might have on H.J. and acknowledged the relationship problems between Mr. Johnson and H.J., Mr. Johnson's inability to accept responsibility for the placement of the children, and Mr. Johnson's inability to empathize with H.J., agreeing that Mr. Johnson could not parent H.J. at that time. Rev. Roberts offered to provide foster care for H.J. in Hawaii.

86. Mr. Johnson then joined Ms. Hilleshiem, Ms. Baker and Rev. Roberts to discuss possible resolution of the situation. Ms. Hilleshiem and Ms. Baker emphasized H.J.'s current fragile emotional state, her need for consistency and stability, her attachment to the Dulaneys, fear of and lack of relationship with her father. They encouraged Mr. Johnson to allow H.J. time to adjust to her changed situation by remaining at the Dulaneys, then to get into joint counseling with H.J. to work on their father-daughter relationship in hopes of increasing the

length and frequency of his contacts and visitation with H.J., so that by doing so their relationship might improve allowing H.J. to feel more comfortable with her father with a goal of allowing H.J. to return with him to Hawaii in the future. Mr. Johnson wanted a specific time limit for this process and a guarantee that, if he did as requested, H.J. would be allowed to go to Hawaii with him. Of course, Ms. Hilleshiem and Ms. Baker were unable to set a specific time limit, stating that it depended on the amount of progress Mr. Johnson and H.J. made, so Mr. Johnson refused to consider any delay. Because the issue could not be resolved, Ms. Hilleshiem set an emergency hearing for August 8, 1991.

87. A hearing was held on August 8, 1991, at which Mr. Johnson appeared personally and with his new counsel, Brian Peterson. Mr. Johnson requested that the CHIPS petition be dismissed and H.J. be allowed to return with him to Hawaii. DCDHS and the guardian ad litem opposed the motion requesting that H.J. remain in Minnesota based in part upon the recommendation of Marcia Guertin, the child's therapist.

88. On August 9, 1991, Mr. Johnson met with Ms. Guertin to discuss H.J. While Mr. Johnson asked questions about H.J.'s therapy, his emphasis was on conveying his view that the Dulaney's were alienating him from H.J. Ms. Guertin explained to Mr. Johnson that H.J. was very bonded to her foster family, had been so for a long time, and no one was attempting to alienate him from his daughter. Ms. Guertin also explained a child's need for stability, predictability, and nurturing in a non-abusive environment and that it was natural for a child to bond to caregivers, such as the Dulaneys, who provided those needs especially if the child was not having an ongoing relationship with their biological parents. Ms. Guertin also told Mr. Johnson that H.J. had made a decision that she was going to remain with the Dulaneys.

89. The Court, in an Order dated August 19, 1991, denied Mr. Johnson's motion, continued custody with DCDHS, ordered DCDHS to implement a reasonable and liberal visitation plan, set a review of the matter in 30 days and indicated that the Court was considering transferring jurisdiction of the matter to the appropriate Hawaiian court to facilitate reunification of Mr. Johnson with H.J.

90. The guardian ad litem and social workers met several times with H.J. to discuss and encourage visitation with her father. H.J. consistently said that she did not want to see her father any more than one time per week and, when forced to go on visits more frequently, refused to go. H.J. also indicated that she was afraid to visit alone with her father because J.J. was no longer there to protect her.

91. To provide safety and security to H.J. and promote visitations, the following efforts were made:

a. Diane Dulaney was present during the visitation for the first week;

b. Visitations were limited in length and frequency for the first week;

c. Visits were supervised;

d. H.J. was called or given DCDHS telephone numbers to call during visits, if necessary;

e. DCDHS made themselves available during visitations for H.J. to call, and if necessary, came and got her (weekends included);

f. DCDHS supervised visits;

g. H.J.'s feelings and desires were solicited;

h. Ms. Guertin's recommendations were

requested and followed; and

i. Since August 7, 1991, DCDHS was present at all visitations to monitor interactions and provide support and encouragement;

92. To ensure that Mr. Johnson received all possible opportunities for visitation, the following measures were taken:

a. DCDHS encouraged H.J. to participate in visitations;

b. DCDHS made contact with H. J. and transported her to Mr. Johnson on the August 7 - 21, 1991 visits;

c. DCDHS increased visitation to respect Mr. Johnson's requests concerning the Sabbath;

d. Since August 7, 1991, DCDHS has been present at all visitation contacts to monitor interactions and encourage visitation;

e. Visitations were increased as rapidly as possible, while still safeguarding H.J.;

f. Ms. Guertin's recommendations were requested and followed; and

g. Mr. Johnson's input was requested regarding visitation concerns and desires.

93. To allow for the most positive atmosphere in the visitation process, the following provisions were implemented:

a. Mr. Johnson was asked not to come to the Dulaney home except when DCDHS was present;

b. Supervisors were asked to pick up H.J.;

involved in all visitations to monitor interactions and provide support and encouragement; and

d. From August 7 - 21, 1991, DCDHS made all contacts with H.J. and transported her to Mr. Johnson;

94. On August 19, 1991, Mark and Diane Dulaney commenced legal proceedings in the District Court of Dodge County by personal service upon Mr. Johnson. The purpose of the proceedings was to obtain legal and physical custody of H.J. An initial hearing was set for September 12, 1991, the same date and time of the next CHIPS review hearing.

95. By letter dated August 30, 1991, Ms. Guertin stated even more clearly H.J.'s psychological attachment to the Dulaney family, as she appeared not only fearful, but distraught at the prospect of losing the Dulaneys and possibly having to live with her father.

96. The guardian ad litem submitted two reports, August 19 and September 10, 1991, requesting the consolidation of the CHIPS and child custody files, that H.J. remain in foster care with the Dulaneys, the Court order parenting and custody evaluations on all parties, expedite trial of the matter, and order supervised visits for H.J. and her father every other weekend and Wednesday afternoons after school, with her father, as opposed to DCDHS or the Dulaneys, having more responsibility for whether the visitations actually took place and the quality of those visitations.

97. In their report to the Court dated September 11, 1991, DCDHS, through Ms. Skeels and Ms. Hillesheim, reported that Mr. Johnson had pressured and threatened them, not respected the boundaries and private lives of others, been insensitive to his

daughter's needs, and sabotaged his own visitations. From July 12 to September 11, 1991, H.J. refused to go on nine out of the 25 scheduled two-hour visits.

98. All parties appeared at the hearing on September 12, 1991, and by Order dated September 27, 1991, the Court consolidated the CHIPS and the custody proceedings, and granted an expedited evidentiary hearing on the Petition for Custody, determining that it had proper jurisdiction of all matters pending before the Court dealing with the custody and the best interests of H.J. Temporary custody of H.J. was allowed to remain with DCDHS, child custody and home studies were ordered, the guardian ad litem and her attorney were appointed on both files, and Mr. Johnson was directed to do the following:

a. Maintain a residence;

b. Actively participate in parenting education recommended by DCDHS;

c. Attend individual therapy recommended by DCDHS;

d. Have regular supervised visitation until deemed appropriate to have unsupervised visits by DCDHS in conjunction with the child's therapist;

e. Sign releases of information requested by DCDHS or the guardian ad litem.

99. Based on the Court's Order of September 27, 1991, joint counseling was commenced with Marcia Guertin between Mr. Johnson and H.J. from October 9, 1991, through February 13, 1992 (nine one-hour sessions). The primary goal of those sessions, as determined by Mr. Johnson, was to improve communication with H.J., which at first Mr. Johnson identified as H.J. paying more attention to him, but later expanded to be sharing experiences and

feelings. From the beginning, Mr. Johnson indicated that he was only there to comply with the Court's Order and identified the Dulaney's "poisoning" of H.J. as the main block to effective communication with H.J.

100. Ms. Guertin reported in a letter dated December 3, 1991, that Mr. Johnson was unable to empathize with H.J., demonstrate any understanding of H.J.'s attachment to her foster family, or reflect back to H.J. what she might be feeling and experiencing. H.J. tolerated her father's presence as long as she directed the activities, was confrontational with her father at times, often yelling at him that she did not want to live with him. Initially Mr. Johnson would verbally spar with H.J., but later he avoided topics where they might disagree.

101. During the fall and early winter of 1991, the visitations deteriorated further with H.J. refusing to go on over one-half of the scheduled visits. H.J. also resumed regressive behavior, such as wetting her bed at night or acting out, for several days after each visit or after joint counseling sessions.

102. On November 5, 1991, a pre-trial conference and hearing concerning visitation was held in the consolidated case with an Order being filed on November 18, 1991. Dr. Friedrich of the Mayo Clinic was ordered to perform psychological and parenting evaluations of the parties; H.J. was ordered to go on visits with Mr. Johnson at least every other weekend during the pendency of the proceedings with additional visits being optional and if H.J. advised DCDHS or the Guardian ad litem that she did not want to go on the optional visits, she was not be required to go; no consequences were to be instituted against H.J. for refusing optional visits; and the Guardian ad litem and therapist were ordered to advise the Court within 30 days as to how best to implement a reasonable visitation schedule.

103. On December 6, 1991, before any inquiries, discussions or attempts by him to facilitate the visit, Mr. Johnson contacted the Dodge County Sheriff's office demanding that they accompany him to the Dulaneys and force H.J. to go on the visit. When they arrived, H.J., who had expressed first that she was not going on a scheduled visit and later changed her mind based upon discussions with the Dulaney's, was ready to go.

104. On December 19, 1991, the Guardian and therapist submitted a joint letter on visitation implementation recommending that respite care be arranged for any Court-ordered visits H.J. refused in a further attempt to eliminate H.J.'s choosing to stay home with the Dulaneys and to further encourage her to go on the visits with her father.

105. In January of 1992, Mr. Johnson made a motion to the Court requesting that H.J. be allowed to go on an extended visit to Hawaii with him in order, allegedly to allow him to complete a Hawaiian home study and to attend to several personal details.

106. By letter dated January 3, 1992, Ms. Guertin indicated concern over the length of time requested, four to five weeks, being too long for H.J. to be out of school, and about where and with whom H.J. would be staying. Ms. Guertin did not see the Johnson's father-daughter relationship at a point where H.J. could make her needs known to her father or where he could interpret or empathize with her needs. There was also a general concern that Mr. Johnson would not return H.J. to Minnesota by guardian ad litem and DCDHS.

107. H.J. wrote a letter to this Court requesting to go to Hawaii. H.J. wanted to go to Hawaii but expressed concerns to others including the therapist Guertin about being with her father.

108. The Court denied Mr. Johnson's motion,

determining that H.J.'s presence was not necessary for a home study in Hawaii, nor necessary to allow Mr. Johnson to attend to his personal details. Mr. Johnson canceled his proposed trip.

109. From the November 18, 1991 Court Order on to the time of trial, H.J. refused to go on any optional visits with her father, and after she returned home from court-ordered visits she displayed regressive behavior, such as wetting her bed for a few nights after each visit. H.J.'s last visit with her father occurred on the weekend of February 15, 1992, when H.J. reported that her father used physical force with her when she did not obey his whim. The incident was investigated by DCDHS. H.J.'s version and Mr. Johnson's version of the events are not consistent. H.J. has visited with Mr. Johnson subsequent to June 1, 1992.

110. Following the commencement of the trial, Mr. Johnson requested that the Court order Dodge County Law Enforcement to enforce his visitations, which request was opposed by DCDHS, the guardian ad litem, and the Dulaney's opposed. The Court instead ordered that H.J. be brought on the occasion of scheduled visitations to the DCDHS offices, giving Mr. Johnson the opportunity to meet with her there for 15 minutes to attempt to get her to go on the visit.

111. H.J.'s visits with her step-grandmother have gone quite well.

112. On April 10, 1992, Diane Dulaney dropped H.J. off at DCDHS for a court-ordered visit with Mr. Johnson. H.J. told the social worker that she was not going. When Mr. Johnson arrived, he and H.J. talked for over one-half hour. They discussed several topics, including H.J.'s desire to stay with the Dulaneys, eat regular food, have better clothes, and attend public schools. Mr. Johnson's response to each topic was to tell H.J. that his beliefs were right, better and preferable to hers in a dogmatic authoritarian

way, refusing to listen to or acknowledge H.J.'s opinions, which frustrated H.J. When H.J. left for respite care, the consequences of refusing to go with him for visitation, she refused any physical contact with Mr. Johnson.

113. Near the end of the trial of this matter, after Mr. Johnson had testified on cross-examination and Dr. Friedrich, Jack Teberg, the Hawaiian witnesses for Respondent, and several social workers had testified, Rev. Roberts was flown in from Hawaii to testify on Mr. Johnson's behalf. Rev. Roberts arrived several days prior to his scheduled testimony, met with Mr. Johnson for eight to ten hours and, thereafter, both he, Mr. Johnson and Linda Christenson testified that Mr. Johnson "finally realized the error of his ways," admitted that his manner of discipline and interacting with his children may have been harsh, and stated that "he would never again act in that manner." Mr. Johnson professed remorse as to his past behavior, and Rev. Roberts and Linda Christenson testified that they believed Mr. Johnson genuinely recognized his problems and had changed. Upon further questioning of Mr. Johnson, however, it was clear that Mr. Johnson's rigid dogmatic beliefs as to discipline, behavior, diet, religion and life had not changed appreciably despite Mr. Johnson's protestations to the contrary.

WITNESS TESTIMONY

Child's Therapist

114. Marcia Guertin is a licensed psychologist and independent clinical social worker employed at Zumbro Valley Mental Health Center in Rochester, Minnesota. She received her Bachelor's of Science degree in social work from Mankato State University and her Master's degree in psychology from St. Thomas University in St. Paul. Her professional employment includes three

years as a social worker in child and family services in Cottonwood County, Minnesota from February 1977 through February 1980; as a child protection worker with Dakota County, Minnesota, from February 1980 through October 1981; as a social worker/therapist providing in home family services with Dakota County from October 1981 through June 1987; and finally as a therapist with the Zumbro Valley Mental Health Center family and children unit from June 1987 to the present.

115. Ms. Guertin provided ongoing individual and family therapy for H.J. Johnson from December 1989 until the present. At first, the primary goal was to develop trust between the therapist and H.J. through non-directive play therapy where feelings and issues were explored as the situations arose because the children were very guarded and private, did not readily volunteer information or respond to direct questioning.

116. Early in the therapy sessions, when discussions occurred about what J.J. or H.J. liked or disliked about their parents, the children talked about not liking their father because he was mean to them and they did not like his excessive and "silly" rules. At that time, H.J. seemed more open to having a relationship with her father than J.J. The children also were confused by their mother and father's relationship and whether they were going to divorce or reconcile.

117. That Ms. Guertin testified that in October 1990 the issue first arose of the children not wanting to live with their mother because of their strong attachment to the Dulaneys, especially H.J.'s strong attachment to Diane Dulaney. During the session, H.J. climbed up into a chair, curled into a fetal position and cried, stating that she felt more loved by Diane Dulaney than by anyone else ever before in her life. Ms. Guertin not only recognized and dealt with that attachment in both individual and

family therapy with the children, but also discussed the situation with the Dulaney's, Ms. Johnson, the social workers, and guardian ad litem to help them deal with this development.

118. After the tragic accident that killed her mother and sister, H.J. revealed in therapy that she did not want to visit with her father because she was afraid that if the two of them got along she would have to leave the Dulaneys. At that time, H.J. began using what she referred to as "bear" behavior to make her father go away, so that her father would not want to be with her and to convince everyone that she did not want to go on visits with him.

119. H.J. also exhibited other oppositional and self destructive behavior and discussed death wishes with Ms. Guertin, the Dulaneys, and the guardian ad litem, which were a serious concern requiring careful monitoring of H.J.'s behavior. Ms. Guertin testified that while it was not typical for children as young as H.J. to express suicidal ideation and death wishes, given the amount of stress that H.J. was under, her inability to deal with that stress, her strong fear of being separated from the Dulaney's, and Ms. Guertin's experience with H.J. as a very strong willed child who could indeed follow through on those threats. Ms. Guertin assessed that there was a real danger right after the accident that H.J. might act out that self destructiveness.

120. Ms. Guertin testified that in her contacts with Mr. Johnson, it was readily apparent that he had no ability to recognize H.J.'s needs. H.J. was an unwilling participant in the joint therapy process, tolerating her father's presence in sessions only as long as she directed the activities, which Mr. Johnson allowed in all sessions stating that H.J. was happiest doing that.

121. Ms. Guertin testified that H.J. was often confrontational with her father, especially when discussing returning or wanting to live with her father. Mr. Johnson

consistently insisted that H.J. wanted to live with him, no matter how many times H.J. told him that she did not, including at times yelling him that she did not. Mr. Johnson refused to accept H.J.'s viewpoint insisting that he knew what was best for her and when asked by Ms. Guertin his response to H.J.'s strong reactions, Mr. Johnson indicated that H.J. was being poisoned by the Dulaneys.

122. On occasion during therapy, Mr. Johnson initiated physical contact with H.J., but was usually rebuffed. Ms. Guertin testified that H.J. told her that she did not like her father touching her, so the situation was discussed with Mr. Johnson and it was decided that, in the future, he would ask H.J. first before attempting physical contact with her.

123. While Mr. Johnson testified he saw progress in his relationship with H.J., Ms. Guertin testified that she saw no progress toward that goal in his and H.J.'s nine hours of joint therapy.

124. Ms. Guertin testified that H.J.'s primary attachment is to her foster family. This attachment occurred, in part, because Mr. Johnson's chose to leave Minnesota and absent himself from his family. During his absence, H.J. sought out what children want and need -- love, nurturing stability, consistency, and predictability, all of which she received in the Dulaney household and caused her to attach to the Dulaney family.

125. Ms. Guertin also testified as to her opinions of H.J.'s behavior toward her father since the accident. H.J. has exhibited oppositional aggressive behavior which Ms. Guertin testified was not a healthy way for a child of H.J.'s age to deal with stress.

126. Ms. Guertin testified that in her opinion the ability to empathize, understand and accept a child's needs and view points are a necessary and important part of being a good parent

and that Mr. Johnson does not possess these skills. Mr. Johnson's primary interest is in his own, not H.J.'s, needs.

127. Ms. Guertin testified that Mr. Johnson's attitude toward her was courteous, yet distant, with him having a tendency to intellectualize things. Mr. Johnson was rigid and unable to accept any alternative point of view and he consistently blamed everyone else for keeping him from his daughter.

128. Ms. Guertin had observed the same ambivalence toward an ongoing relationship with her father which Dr. Friedrich identified except that she saw absolutely no ambivalence in H.J. about not wanting to live with her father.

129. Ms. Guertin also testified that the behavior which she observed and had reported to her, clearly indicates that H.J. does not want to be with her father, there is no strong bond between H.J. and her father and in fact there is a significant lack of attachment between H.J. and her father. Ms. Guertin testified that it is her assessment that H.J. will not allow any kind of attachment with her father until the issue of where she is going to live is resolved.

130. Ms. Guertin testified that H.J. had and continues to have a very strong emotional bond with the Dulaney family; that she feels very loved by them, very attached to them, and that the Dulaney family provides H.J. with stability, security and a nonabusive limit setting environment which she does not want to leave. Because of the circumstances of H.J.'s background, the reasons for her placement in foster care, and her father's leaving the state shortly after her placement, H.J.'s bond is a natural outgrowth of her placement.

131. Ms. Guertin testified that the ability to bond is a key ingredient in H.J.'s ability to develop to her full potential and that there would be severe consequences to breaking that bond

whether right after the accident or today.

132. Ms. Guertin testified that Mr. Johnson leaving the State of Minnesota had a direct impact on his children. While Mr. Johnson's stated reasons for leaving the state were that he had to take care of his own physical and emotional needs, by doing so, he distanced himself from his children which hampered the development and retention of any kind of bond between himself and his daughters. The time period of almost one and one half years when Mr. Johnson was gone, during H.J.'s developmental stages, is a significant period of time. Ms. Guertin also testified that based upon her contacts with Mr. Johnson, he did not understand the significance of his leaving the state and not being able to interact on an ongoing basis with his children.

133. Ms. Guertin testified that although children are influenceable and shaped by significant institutions and persons in their lives, she has not seen any evidence of any coaching by anyone for H.J. to want to stay with the Dulaney's. It was an issue early in therapy and she believes that H.J.'s expressions concerning this are genuine.

134. Ms. Guertin testified that H.J.'s current situation is extremely stressful for her. H.J. is caught in the middle between adults who are battling over her. The situation needs to be resolved and until it is resolved, H.J. will be unable to cope with the stress which this situation puts her under.

135. Ms. Guertin testified that H.J. has strong feelings about wanting to stay with the Dulaney's and not live with her father.

136. Ms. Guertin testified that based on her information and observations of the Johnson family, that the natural family attachment had been strongest between J.J. and H.J. H.J.'s attachment to her parents was not intense or healthy. J.J. did most

of the parenting of H.J. and was not equipped to deal with it because she was a child. It wasn't until H.J. was placed in the Dulaney foster home that she was provided with a responsive, nurturing, consistent, and predictable environment. The Dulaneys empathize with H.J., are sensitive, responsive and can meet H.J.'s needs in an appropriate manner.

137. Ms. Guertin testified that if parents can not understand children's needs they can not meet those needs. The Dulaneys can understand and meet H.J.'s needs. It is Ms. Guertin's opinion, based on her observations of H.J. and Mr. Johnson in therapy and all of the information which she is aware of, however, that Mr. Johnson can not recognize or understand and therefore is unable to meet H.J.'s needs. Ms. Guertin testified that during joint therapy between Mr. Johnson and H.J., she had not seen the alleviation of any stress between H.J. and her father or that any of Mr. Johnson's interactions with H.J. had changed or improved.

138. Based upon all of her observations and information which she possesses, Ms. Guertin testified that she believes that it is in H.J.'s best interest for custody to be granted to the Dulaneys because H.J. has a strong emotional attachment and is integrated into the Dulaney home; the Dulaneys provide stability, consistency and a nurturing environment that is responsive to and meets H.J.'s needs. Ms. Guertin testified that it would be detrimental in both the long and short term to remove H.J. from the Dulaney home.

139. Ms. Guertin does not view Mr. Johnson as a "fit or suitable" parent for H.J. because of his past behavior, longstanding personality characteristics of rigidity and lack of flexibility, lack of empathy for H.J., and failure to identify her issues and needs.

140. Ms. Guertin also testified that, based upon her observations and the information she has collected, it would

actually be detrimental to place H.J. in her father's care, that H.J. would be endangered in her father's care, and that extraordinary circumstances exist which require the placement of H.J. with a third party non-biological parent.

Dr. William Friedrich

141. H.J., her father, and the foster parents, Mark and Diane Dulaney were evaluated pursuant to Court Order by Dr. William N. Friedrich of the Mayo Clinic with psychological testing and parenting evaluations. The guardian ad litem chose Dr. Friedrich as the evaluator.

142. Dr. William Friedrich has been a consulting psychologist in the Department of Psychology and Psychiatry at the Mayo Clinic in Rochester, Minnesota since 1986. He has degrees in Biology, Chemistry and Psychology from Texas Lutheran College, Seguine, Texas, an Master's degree in Behavioral Sciences from the University of Texas Public Health, Houston, Texas and a Ph.D in Clinical Psychology from the University of North Dakota, Grand Forks, North Dakota. He completed his internship in Clinical Psychology (APA-Approved) at the Texas Research Institute of Mental Sciences, Houston, Texas. He has been a professor at various schools, such as the University of North Dakota, University Washington, Seattle Pacific University, the Child Development Retardation Center at the University of Washington, Children's Orthopedic Hospital in Seattle Washington, and is an instructor in Clinical Psychology at the Mayo Medical School and the University of Minnesota-Rochester Center.

143. Dr. Friedrich has published many articles and books and conducted presentations on various topics in clinical psychology throughout the nation over the last decade dealing

mainly with sexual abuse and neglect of children. He is affiliated with the American board of Professional Psychology and the American Ortho Psychiatric Association, american Professional Society of Abuse on Abusive Children, and seven divisions of the American Psychological Association. He is a Diplomate in Clinical Psychology and Family Therapy of the American Board of Psychology. He is a supervisor for the Association of Marriage and Family Therapists and a licensed psychologist in the states of Washington and Minnesota.

144. As part of the evaluation, each individual was interviewed and evaluated with a variety of psychological measures and tests. Dr. Friedrich also read an extensive volume of Court records, previous psychological evaluations of H.J. and Mr. Johnson, interviewed H.J.'s foster mother and the guardian ad litem and observed H.J. with her father and foster parents in home studies characterized by free play over one hour periods.

145. H.J. Johnson was evaluated at the Mayo Clinic on April 18, 1991; December 17, 1991; and then with her father in the Christenson home on January 8, 1992; and with Diane and Mark Dulaney on January 10, 1992, in their home. She was given a standard child assessment battery including a clinical interview, the Wechsler Intelligence Scale for Children-Revised, the Wide Range Achievement Test-Revised, The Woodcock-Johnson Psycho-Educational Test Batter, MacCarthy Scales of Children's Abilities, Verbal Selective Reminding Test, Continuous Recognition Memory Test, Trailmaking Test, Roberts Apperception Test for Children, the Rorschach, Trauma Symptom Checklist, and the Achenbach Child Behavior Checklist. Because of H.J.'s cooperation and motivation, her testing was valid.

146. The testing showed H.J.'s intellectual abilities to be in the upper half of the average range with relative difficulties

with math computation and clear strength in reading comprehension. That because of H.J.'s head injury in the accident July 6, 1991, her verbal and visual memory skills were also assessed, and Dr. Friedrich found H.J. to be significantly impaired on the verbal selective reminding test, showing problems with both initial encoding and consistent long term retrieval. H.J. was in the normal range on the McCarthy memory sub-scale which is a more logically organized test and thus for organized and sensible information, H.J.'s verbal memory difficulties are not apparent, although she has more difficulty learning random and discrete new facts. H.J.'s visual memory as measured by the Continuous Recognition Memory Test was completely within normal limits. The results of the Trailmaking Test, however, suggest that the accuracy of H.J.'s sequential processing declines as a task becomes more complex, which would be consistent with her below average performance on the Picture Arrangement subtest on the WISC-R and her relative difficulties with math and may be related to social sequencing difficulties, e.g. abruptness, interrupting, less smooth social interaction. Given the evidence of a persisting math disability and the hint of some memory disabilities, Dr. Friedrich strongly recommended a neuropsychological re-evaluation by July 1992.

147. Dr. Friedrich testified that based on personality testing using objective and projective assessment techniques, H.J. showed moderate levels of anxiety and post-traumatic stress, e.g. intrusive thoughts, flashbacks, etc., reported fear and anger at men, specifically, from the Trauma Symptom Checklist for Children. H.J.'s human figures drawings were consistent with unresolved anxiety and discomfort about her mother and sister's death and her relationship with her biological father. On the picture stimuli card from the Roberts Apperception Test for Children, many of the

stories told by H.J. involved characters feeling sad, angry, scared, or upset, were brief and did not describe resolution of these distressing emotions. The Rorschach Test, scored with the Exner system, indicated significant depression and loneliness consistent with having experienced a recent loss. H.J. maintained a pessimistic view of the world, her understanding of interpersonal relationships was immature, and she did not anticipate obtaining support from interactions with others. The behavior checklist noted concerns of H.J. having difficulty with concentration, over activity, arguing, demanding attention and clingy behavior.

148. Dr. Friedrich found H.J. likely experiencing a number of intense and confusing emotions and somewhat insecure, requiring frequent assurances and limit-setting. H.J.'s thinking was markedly influenced by her emotions and her problem-solving proceeded through trial and error, rather than more planful decision-making. H.J. reported depressive thinking and moods, reporting that she had intrusive thoughts about the accident which killed mother and sister and also had some survivors guilt.

149. In his interviews with H.J., Dr. Friedrich noted that H.J. avoided the discussion of strong feelings, had a somewhat distorted view of the deaths of her mother and sister, and was reluctant to discuss her biological father or foster parents. H.J. described Mr. Johnson as "mean" elaborating that he had "too many rules," "does not like me," and "makes me scared." She described the Dulaney's as "nice" and that she enjoyed being "with the family."

150. In summary, Dr. Friedrich testified that H.J. was a nine year old girl with a tragic past, significant emotional scarring, with a mild math disability that will be a continuing stressor in her life. As a result, H.J. will need both a supportive home environment with people who love her in a genuine and

unconditional manner, the opportunity for remediation at school, and psychotherapy at different strategic points in her life to help her manage her behavior and come to a more mature appreciation of who she is and what she has overcome. Adequate parenting of H.J. will require the provision of appropriate mental health services to help H.J. deal not only with what appears to be fairly long standing impaired self-esteem and distrust of other people, but also more acute stress about the deaths of her mother and sister. H.J.'s unpredictable and variable behavior will require consistent, but flexible, parenting.

151. Mr. Johnson was evaluated on December 5, 1991; December 17, 1991; then observed with H.J. in the Christenson home on January 8, 1992. He was evaluated with the standard battery of tests, including clinical interviews, the Wonderlic Personnel Test, which results in a WAIS-R equivalent IQ, the Thematic Apperception Test, the Rorschach, the Millon Clinical Multi-Axial Inventory-II, and the MMPI. In addition, Dr. Friedrich reviewed various court documents, correspondence and previous psychological evaluations done on Mr. Johnson. All testing was valid and showed Mr. Johnson's overall intellectual abilities to be in the superior range.

152. Dr. Friedrich testified that the MMPI and MCMI-2 showed Mr. Johnson to be extremely defensive, portraying himself in as favorable light as possible, and extremely angry although he would deny it; having significant needs for dominance and control; that his day-to-day emotional resources are significantly less than he would want other people to believe or what his overt behavior might indicate; the likelihood of him behaving impulsively, even bizarrely, was extremely high and that he was a rather isolated and even an "odd" individual. His Millon profile showed prominent features of conformity, denial, and tension; he was extremely

defensive about admitting psychological problems and denied his strong feelings, fearful that expression of them might result in loss of emotional control; that Mr. Johnson felt inadequate and insecure under his controlled facade, had marked self doubts and a deflated sense of self-esteem which resulted in him seeking a supportive institution, such as his church to gain protection and associate his actions with something whose authority cannot be questioned. He was overly concerned and preoccupied with minor details which distracted his attention from his intense feelings of anxiety and inadequacy. Mr. Johnson's interpersonal relationships were characterized by ambivalence and hostility.

153. The projective personality assessments included the Thematic Apperception Test (TAT) and the Rorschach which was scored with the Exner system showed conformity to rules, avoidance of emotion with people frequently estranged from each other or misfits in their interpersonal relationships, and that Mr. Johnson was overly tuned into sexuality and sexual detail. The centrality of Mr. Johnson's religious beliefs included a refusal to respond to two of the sentence stems for personal and moral reasons. The results of the Rorschach indicated:

a. An extremely narcissistic individual who overvalues his personal worth, whose interpersonal behavior was characterized by a protection of his exaggerated sense of self-value, and who, as a result, finds it very difficult to establish and maintain deep, meaningful interpersonal relationships;

b. Mr. Johnson is overwhelmed by internal distress, has considerable difficulty in dealing with this distress and has an unusually limited capacity for control given his age;

c. Mr. Johnson is immature, prone to

experiencing frequent difficulties when interacting with the environment, and not as interested as in other people as most individuals;

d. Mr. Johnson's ideational sets and values are inflexible and as a result he finds it very difficult to alter attitudes or opinions or to view issues from a perspective different than that which he holds; and

e. Mr. Johnson has serious problems with thinking and instances of disjointed thinking and faulty conceptualizations.

154. Dr. Friedrich testified he found Mr. Johnson to be a remarkably self-centered, rigid, and rejecting man ambivalent about his relationship with his daughter, showing no openness to change given the fact that he fears decompensation if he does. Mr. Johnson's marriage to Lucy Johnson was essential to him so he could use her as a way to view himself more positively; his rigid overcontrol was balanced by her being out of control and his fear and denial of his aggression and sexuality were balanced by her aggression and overt sexuality. Dr. Friedrich testified that it was likely that his relationships with other family members would develop in this same manner, where H.J., for example, would be forced into a position of acting out in a manner similar to her mother.

155. Diane Dulaney was evaluated and then observed with H.J. in her home on January 10, 1992. She was evaluated with the standard battery of tests, including clinical interviews, the Wonderlic Personnel Test, which results in a WAIS-R equivalent IQ, MMPI and the Millon Clinical Multi-Axial Inventory-II the Thematic Apperception Test, the Rorschach, the Millon Clinical Multi-Axial Inventory, and MMPI. All testing was valid and showed Diane Dulaney's overall intellectual functioning to be in

in the average range.

156. Dr. Friedrich testified that in clinical interviews, Diane Dulaney was quite open and revealing in a significantly mature and appropriate manner and that she accurately described her children and herself.

157. Objective personality assessment through her completion of the MMPI, showing Diane Dulaney to be more defensive than her interview with Dr. Friedrich, suggested that she may be somewhat out of touch with her feelings, somewhat naive interpersonally, and to have appropriate dominance and dependency needs. While her resilience in coping with stress was somewhat lower than Dr. Friedrich expected, indicating that she may not have as well established sense of herself as might be optimal in her role as a parent, at the same time, this type of selflessness is often desirable in compassionate parenting. Dr. Friedrich testified that based on his clinical interviews and observations, her MMPI scores showed no parenting deficiencies in Diane Dulaney.

158. On the Millon, Diane Dulaney was noted as calm, pleasant, noncompetitive and self effacing person with a slight underlying sense of insecurity and concern about abandonment, some minimal somatic symptoms, e.g. weakness, physical illness, etc., which allow an outlet for underlying distress.

159. On projective testing, Diane Dulaney's task responses were complex reflecting a rich and accurate understanding of interpersonal relationships, her ability to view situations from the perspectives of many people showed interpersonal complexity allowing for greater sensitivity to other's needs and flexibility in response to their needs, such as in parenting. Diane Dulaney admitted needing to learn better communication skills and to accept what cannot be changed. Her Rorschach responses, scored on the Exner scale, suggested a

woman with a well established sense of self with sufficient emotional resources to deal with day-to-day stressors, who may have difficulties modulating her emotions, but who perceives positive interactions among people as a routine event. In problem solving, Diane Dulaney merged feelings with thinking giving rise to more elaborate patterns of thought which result in a greater tolerance for ambiguity, again a characteristic essential to good parenting.

160. Dr. Friedrich testified that Diane Dulaney was an open person working on a few minor changes including increasing her assertiveness and allowing alternative means to express her feelings. Some of the personality traits which might be counted against her, e.g. her naivete, also make her willing to extend herself for children and assume other people are going to treat her appropriately. Diane Dulaney's accuracy of her perception of her own children, herself, and her openness and appreciation for complexity and ambiguity in relationships are what made her an extremely competent and capable parental figure.

161. Mark Dulaney was evaluated and then observed with H.J. in her home on January 10, 1992. He was evaluated with the standard battery of tests, including clinical interviews, the Wonderlic Personnel Test, which results in a WAIS-R equivalent IQ, MMPI and the Millon Clinical Multi-Axial Inventory-II the Thematic Apperception Test, the Rorschach, the Millon Clinical Multi-Axial Inventory, and the MMPI. All testing was valid and showed Mark Dulaney to have above average intellectual abilities.

162. On the MMPI, Mark Dulaney was quite open, had adequate emotional resources to deal with day-to-day stressors, although he might be more angry than he realizes, and could benefit from continuing to understand his feelings and there was no indication of a Personality disorder.

163. The Millon Multi-Axial Inventory showed Mark Dulaney to be somewhat introversive and timid in relationships, preferring to remain in the background. He overly modulates his expression of feelings, might be somewhat reluctant to accept help from others, readily sacrifices his own interests, tries not to be a burden, acts in a compliant and placating manner, is quick to blame himself rather then others and prefers to lead an uneventful and somewhat more isolated life that the average person.

164. Projective testing through the TAT stimulus cards showed Mark Dulaney to have some difficulty communicating about emotions, be somewhat isolated and emotionally cutoff from others, and may have some hopelessness about interpersonal relationships perhaps because of his relatively passive interpersonal style. The Rorschach, scored with the Exner scale, indicated a man with enough emotional resources to deal with day-to-day stressors, who behaved in an acceptable manner, preferring to keep feelings at a peripheral level, who engages in more self-inspecting behaviors that focus on negative features about himself than is the rule, may find emotions somewhat confusing, and routinely perceives and is willing to participate in positive interactions among people. There was no evidence of impaired thinking, problems with the modulation of feelings or the expression of emotions.

165. Dr. Friedrich testified that Mark Dulaney is a reasonably healthy individual becoming interested in how his family of origin has shaped him, has recognized that his usual logical problem solving mechanisms may not work as effectively when one sees the world in a more mature and complex manner therefore needing to understand his feelings, correcting a lower than optimal self esteem and as a result feeling more alive and vital interpersonally. Mark Dulaney's openness regarding his

emotional and interpersonal issues supported by his active pursuit of counseling speaks well for both his current and future potential as both an individual and parent.

166. Dr. Friedrich testified that he was aware of the fact that the Dulaney's oldest daughter, Leah, was not living at home, having left because of a difference of opinion with her parents, that Mr. and Deane Dulaney discussed with him the issues that led to the move and the steps they were taking to alleviate the issues. Dr. Friedrich saw that in some ways Leah had a strike against her being born before the parties were married, which might have led to the interactional problems that resulted in Leah leaving the Dulaney home.

167. Dr. Friedrich testified that H.J. will be a complex difficult child to parent as she feels ambivalent about the adults in her life, has learned to be manipulative, is emotionally reactive, and needs to learn other more appropriate types of behaviors. H.J. needs parents who will be there, not parents who have abandoned her, such as her natural mother and father.

168. Dr. Friedrich testified that it would be in H.J.'s best interest to remain with the Dulaney's. H.J. has complex medical and psychological needs, will be difficult to parent needing flexible parenting with specific guidelines. The persons who parent her must be sensitive, supportive, selfless, unconditional, let H.J. know that she is clearly valued and create opportunities for success for H.J. Dr. Friedrich testified that the Dulaneys clearly provide this type of atmosphere, but her natural father, Mr. Johnson could not.

169. Dr. Friedrich testified that no child can behave in the type of rigidly controlled pseudo mature manner that Mr. Johnson does. H.J. will disappoint her father and he is not mature enough to understand or deal with that disappointment. Mr.

Johnson's past parenting has been unpredictable and he has inflicted punitive punishment on his children. Dr. Friedrich testified that looking at the history of this case, Mr. Johnson's punishing approach to discipline with his children clearly placed H.J. at risk for continuing abuse if custody is returned to Mr. Johnson -- a high risk for emotional abuse and a moderate risk for physical abuse.

170. Dr. Friedrich testified that his observations of the interaction between H.J. and her father exemplified the arousal which being with her father produces in H.J. When H.J. came to the visit, she was sedate and under control. As the visit progressed, H.J. became more wound up so that by the end she was clearly exhibiting frenetic, anxious behavior. The reports of bed wetting after being with her father at therapy sessions or visits clearly reflects this.

171. Dr. Friedrich testified that given the amount of time that Mr. Johnson has been back in Minnesota, the amount and type of visitation and joint therapy offered to Mr. Johnson and H.J., H.J. should have habituated to the visitation with her father by now, which she clearly has not done.

172. Dr. Friedrich testified that H.J. has habituated into the Dulaney home. H.J. feels no favoritism or isolation there, clearly identifies the Dulaneys as her primary family, and that it would be detrimental to H.J. psychologically to remove her from the Dulaneys at this time. To place H.J. in her father's care would endanger her both psychologically and physically.

173. Dr. Friedrich testified that Mr. Johnson did not understand or appreciate the role he played in his family's dysfunction or H.J.'s fear and desire not to live with him. Dr. Friedrich testified that he reviewed a copy of Dr. Philip's report and that the activity it described clearly exemplified the extremely

high level of activity with Mr. Johnson which he had previously seen as well as the fact that H.J. was relaxed, calm and quiet in her interaction with the Dulaney's. While Dr. Friedrich placed importance upon these observations, Dr. Philip discounted them.

174. Dr. Friedrich testified that there was the possibility of the need for long term or future psychotherapy for H.J. to deal with many of the issues of her life and that Mr. Johnson would not recognize or meet those needs as he sees counseling as a sign of weakness.

175. Dr. Friedrich testified that there was no evidence from his observations and testing of H.J. that the Dulaney's or anyone else had planted thoughts or poisoned H.J.'s mind against her father.

176. Dr. Friedrich testified in his observation of Mr. Johnson and H.J., review of Dr. Philip's report, and other reported incidents of visitation between H.J. and Mr. Johnson, he was struck by H.J.'s persistence in playing hide-and-go-seek which he testified encapsulated H.J.'s ambivalent relationship with her father.

177. Dr. Friedrich testified that he was also concerned about the special problems which would arise for Mr. Johnson as a single parent raising an opposite sex child. Although no empirical data exists, studies Dr. Friedrich has seen have shown the situation to be plagued with problems and given Mr. Johnson and H.J.'s psychological make-ups, Dr. Friedrich believes that it would be a problem in this case.

178. Dr. Friedrich testified that the evidence that he reviewed concerning Mr. Johnson's physical and emotional abuse of his daughters, striking them with a wooden object, covering their nose and mouth to keep them from crying, depriving them of food and other reported behaviors is consistent with Mr. Johnson's personality profile. Mr. Johnson's controlling the children's crying

and screaming by placing his hand over their nose and mouth and inappropriate use of force with the children added to the children's feelings of being out of control and arousal and had a detrimental psychological impact on children.

179. Dr. Friedrich testified that Mr. Johnson is remarkably self-centered, has chronically unmet dependency needs, and evidence of unmet ego strength due to his being rigid and controlling. If Mr. Johnson gave up that control, he must then deal with issues and look elsewhere for how to operate and behave and fears decomposition if he does so. An individual with Mr. Johnson's personality profile becomes uncomfortable with new parenting ideas as evidenced by his decision to discontinue counseling and parenting classes with Glen Izawa and Harriet Nathan in Hawaii because the classes did not agree with his religious philosophy.

180. When asked about the Dulaney's situation with Leah, Dr. Friedrich testified that the Dulaney's were in counseling with Leah at the time the decision was made for Leah to leave home, which he viewed as a "net positive." He felt that the Dulaney's have been asked and seen the need to make some changes concerning Leah and have tried to meet those needs. The Dulaney's have been open to input from others concerning how to deal with Leah, as well as being open about discussing the situation of Leah with himself and others. Dr. Friedrich testified that Leah's not living at home is unusual and does cause him concern, but the Dulaney's responses to the situation with Leah were appropriate and did not foreshadow future parenting problems for the Dulaney's with H.J.

Child's Guardian Ad Litem

181. The guardian ad litem appointed by the Court for H.J., Gail D. Baker, is a licensed practicing attorney in Minnesota. She received her law degree from Suffolk University Law School in Boston, Massachusetts in 1981 after completing her undergraduate work at the University of Minnesota in 1978. Ms. Baker has been actively involved in children's issues throughout and subsequent to law school. Her involvement in professional associations includes the Olmsted County Bar Association, Minnesota State Bar Association and American Bar Association. She has been active in the Young Lawyers Division and Family Law section of the American and Minnesota State Bar Associations, having been a member of or chaired child protection and child welfare law related committees and task forces including the American Bar Association Center for Children and the Law's child support committee and the fifty state child welfare law tracking project. Ms. Baker has practiced primarily in the area of family law for over ten years and represents children and adults in family and juvenile court matters including termination and CHIPS proceedings. She has also served as a Guardian Ad Litem for approximately twelve to fifteen children over the past five or six years.

182. Ms. Baker was initially appointed as the guardian ad litem for both J.J. and H.J. in February of 1990. Ms. Baker testified that she perceived her role to conduct an independent investigation evaluating what was in the best interest of the children and advise the Court of her recommendations. She received the court file, contacted DCDHS, reviewed all the information in the DCDHS file, talked with Ms. Pettey, the foster parents and the children to obtain background information needed for her assessment and recommendations and because she did not

know much about the Seventh Day Adventist religion, spent approximately five to six hours researching its tenets.

183. When Ms. Baker first met with met with J.J. and H.J. on February 14, 1990 her observations of the children were that they were shy, reticent and perhaps a little scared because of her title, so she explained her role and the court process to them, discussing with them why we were going to court, why they were removed from Christensons, and the physical and emotional abuse they received from their parents. The children wrote down several things they wanted the Court to know and told Ms. Baker that they felt safe and happy at the Dulaney's.

184. Prior to the hearing on February 15, 1990, Ms. Baker also met with Lucy Johnson and discussed the Guardian's role with her and her attorney as well as Mr. Johnson and his sister to discuss the proceedings, whether he intended to admit or deny the Petition, and the need for evaluations of both parents in order to make any further decisions.

185. Because the children had already been evaluated by Ms. Guertin at Zumbro Valley Mental Health Center, it was recommended that the parents be evaluated there also. It was discussed that if the evaluations were satisfactory, the children might be returned to their parents after minimal counseling and parenting education and training, but no decision could be made until the evaluation results were received.

186. In March 1990, the social worker contacted Ms. Baker regarding concerns about J.J.'s academic achievement and behavior at school. Strawberry Meadows school was requiring the Dulaneys to regularly discipline J.J. when she misbehaved at school by picking her up from school, punishing her at home, and not allowing her to return to school until she had recognized the error of her ways. The Dulaneys objected to these methods. Ms.

Baker went to the school, spoke with the teacher, observed some of the interaction, and reviewed some of the books used by the school. Ms. Pettey spoke to the teacher about the disciplinary methods used by the school and was concerned with the use of corporal punishment. After the children were evaluated and tested by the Claremont public schools in an effort to evaluate each of their individual educational needs, Ms. Baker met with the Claremont public school providers and Ms. Anderson of the Marantha school to evaluate which setting would better provide for the children's educational needs. After a careful review of the information she had gathered and discussions with the Dulaneys and Ns. Pettey, Ms. Baker concluded and recommended that the children be enrolled in public school.

187. Ms. Baker continued to monitor the progress, or lack thereof, of both Mr. and Mrs. Johnson, by talking with them, DCDHS, their therapists and others. As in most cases, Ms. Baker testified that she relied on written reports from various professionals involved in the case, who were dealing with Mr. and Mrs. Johnson in professional areas in which she was not qualified.

188. Ms. Baker had a very good relationship with the children seeing them on an average of once a month, making sure to see them before every court hearing and if any particular issues or problems arose. Lucy Johnson's instability caused Ms. Baker to be more involved than usual as a guardian ad litem as there were complex issues regarding counseling and visitation that constantly needed to be addressed. Over the two year period that she has been involved with this case, Ms. Baker visited with the children between 32 and 36 times for at least one to one and one-half hours each time. After the accident, she visited with H.J. at the hospital, family visitation before the funeral, and after that, every one to two weeks because of her special emotional needs and

therefore believes she knows H.J. better than many other children for whom she has served as a guardian ad litem.

189. The only visit Ms. Baker supervised between the children and Mr. Johnson was on Sunday April 22, 1990. Ms. Baker picked the children up and met Mr. Johnson in Mantorville. The children were anxious about seeing their father at first and they all played at the park. Mr. Johnson then took them to the Grand Olde Mansion to see where he was staying and introduced them to Irene Felker, the owner. Then they went to Oxbow Park. Ms. Baker testified that she observed Mr. Johnson and the children's interaction, tried to stay within hearing distance, but was not actively involved in the visit. The children laughed, joked and roughhoused with Mr. Johnson, and he walked on his hands. At one point Mr. Johnson and the children walked out of Ms. Baker's hearing and when they returned, they left Oxbow Park. After dropping Mr. Johnson off at the Grand Olde Mansion, the children were upset saying, "don't leave us alone with him, he says bad things about our Mom." Before the next hearing, Ms. Baker discussed with Mr. Johnson his inappropriate comments and the effects they had on the children, that he could not make similar comments in the future and that his visits would continue to be supervised because of this.

190. Ms. Baker testified as to Mr. Johnson's vehemence about getting the children back. For several months he called her almost every Sunday night with concerns about the children's diet, what he perceived as "H.J.'s lactose intolerance," medical doctors, and the issue of public versus private schools. Mr. Johnson rarely talked about his children's needs, focusing more on his own rights and needs concerning them, and displaying his lack of acknowledgment of the real issues and problems, consistently stating that his children were "wrongfully" taken from him and

should be with him.

191. Ms. Baker testified that as time passed, religious issues became less and less important with Lucy Johnson and the children. Ms. Baker became aware of most of the dietary changes when the children told her about them and when questioned, the children stated that their mother had begun permitting them to eat things that had been previously restricted which they liked. In Ms. Baker's opinion DCDHS was very sensitive to Mr. Johnson's dietary and religious issues regarding the children.

192. In conversations with H.J. since the accident, H.J. has expressed to Ms. Baker that she believes her mother and sister are sleeping. Ms. Baker testified that she does not believe that the differences between the Dulaneys and Mr. Johnson in their respective religious practices have adversely affected H.J. and that the Dulaneys are not influencing H.J. in a negative manner. H.J. also has some survivor guilt surrounding her mother and sister's deaths. For example, she wondered whether J.J. might have lived if the medical personnel had not taken care of her.

193. H.J. has also expressed to Ms. Baker that she does not like going to church; it does not matter which church and she especially does not like going two days in a row. Since the accident H.J. has said she does not want to go to the Seventh Day church because she always went there with her mother and sister and could not go without them.

194. Ms. Baker has encouraged H.J. to visit with Mr. Johnson, especially since the accident. She testified that she believes it is important for Mr. Johnson and H.J. to work on their relationship. H.J. had always felt uncomfortable visiting with her father always requesting supervision, and since the accident, however, H.J. has become even more adamant about not wanting to see her father and that she is scared of him. Eventually, the

Court ordered H.J. to visit every other weekend and when she went, those visits went well for awhile until the February 15-16, 1992 incident when Mr. Johnson allegedly kicked H.J. and the trial began.

195. Ms. Baker testified that she was torn regarding the consequences to be assessed against H.J. for failing to abide by the court ordered visitation because H.J. has been so traumatized, but is also concerned about how much control and how manipulative H.J. is if allowed not to attend visits. Limits need to be set with cause and effect clear to H.J., which was the purpose of requiring respite care for H.J. when she refuses court ordered visits.

196. Ms. Baker testified she believed that DCDHS made more than appropriate visitation arrangements and were sensitive to Mr. Johnson's and H.J.'s needs, even going so far as to be available on weekends.

197. H.J. has consistently told Ms. Baker that she is afraid of her father for several reasons including:

a. He hit her frequently with a stick;

b. He held his hand over her mouth and nose when she cried which scared her immensely; and

c. He withheld food or meals if she broke a rule.

Both she and J.J. liked living with the Christensons and really love the Dulaneys, calling them "mom and dad."

198. Ms. Baker testified it was clear when she first met them in February of 1990 that the girls had already bonded to Diane Dulaney. They had few good things to say about their father, but did talk about the good times they had with their mother. Ms. Baker observed them to be physical and loving with their mother. Visits with Mr. Johnson were problematic from the

beginning with the children not wanting to see their father and Ms. Baker and DCDHS having to come up with exciting and interesting things for the children to do so they would go on visits with their father. The children were more attached to the Dulaneys than to either their mother or Father.

199. It became apparent to Ms. Baker early on, specifically from conversations with the children's therapist, Ms. Guertin, and the problems with expanding visits for possible reunification with their mother, that the bond the children had with Diane Dulaney was very strong with H.J. stating that no one had loved her as much as Diane Dulaney. The children referred to the Dulaneys as "Mom and Dad" and the Dulaney's house as their home. Ms. Baker described the children detailing some twenty to twenty-five different that they had lived with their parents and their desire even before the accident to stay where they were now, with the Dulaneys.

200. Ms. Baker testified the significance she attributed to Mr. Johnson's absence from Minnesota since the children were placed in foster care by Dodge County and how difficult it was on the children. During his limited contacts with them in Minnesota around his court appearances, the children were expected to drop all their other plans and visit with their father. Mr. Johnson did not consider the children's needs or the effect his visits and noncontact had on them which made reunification difficult.

201. Ms. Baker has not observed any visits between Mr. Johnson and H.J. since April 1990 even though she offered to supervise visits and even asked to observe visits since Mr. Johnson returned to Minnesota because Mr. Johnson claimed it would not be productive because H.J. acted differently when her guardian ad litem was present and that Ms. Baker was opposed to him and not on his side.

202. Since the accident, Ms. Baker has been involved with the visitation between H.J. and her father. Ms. Baker discussed visits with H.J. and at first H.J. was very upset about having any visits with her father. She only wanted to see him one time per week. As overnight visits progressed, H.J. said she did have fun sometimes, but still insisted that she did not want to see him as often as scheduled by DCDHS and that when she asks to come home (to the Dulaneys) as allowed by DCDHS as a condition of visitation, her father refused to listen to her, allow her to call, or allow her to leave, which was very upsetting to H.J. H.J. also told Ms. Baker she is afraid that if visits with her father go well, the Judge will think she wants to live with her father which she does not. Ms. Baker testified that she thinks this is an accurate reflection of the confusion H.J. feels about her situation and that until the custody decision is made, H.J. will not be comfortable on visits with her father. Once H.J. makes up her mind, there is no changing it. H.J. is stubborn and scared about what her future holds. She has refused to go on a majority of the scheduled visits and has refused all visits since the commencement of the trial.

203. Ms. Baker testified that she reviewed Dr. Frederich and Dr. Philip's evaluations and it is her opinion that Dr. Frederich's conclusions are more congruent with what she knows and has observed.

204. Ms. Baker stated that the Dulaneys have been very responsive to H.J.'s needs in the following ways:

a. Cooperating with and encouraging visits with both her mother and father prior to and since the accident;

b. caring for H.J.'s medical, physical and emotional needs prior to and since the accident;

c. keeping detailed records;

d. being quick to notify DCDHS and the guardian ad litem of changes or potential problems;

e. being concerned and interested in counseling for H.J. even before the accident; and

f. being consistent and attentive with H.J., giving her much needed love, security and stability.

She believes that everything the Dulaneys have done since the children were placed with them in October 1989, has centered on H.J.'s best interests.

205. Ms. Baker testified that this case needs to be resolved quickly for H.J.'s sake. The trial and its outcome weighs heavily on H.J. because of her concern over its possible results. H.J. has been talked to, examined and evaluated by numerous people over the last 32 months and she is frustrated with the process and the length of time it has taken. H.J. has also stated a repeated desire to speak to the Judge and express her wishes.

206. Ms. Baker testified that based on the totality of the circumstances and on all the information in the files, it is in H.J.'s best interest to remain with the Dulaneys as they are better able to recognize, understand and meet her physical and emotional needs. The circumstances in this case are unusual and justify custody with a nonparent. Ms. Baker testified to a strong preference that parents be with their children, but given the events leading to placement, length of placement, Mr. Johnson's inability to recognize this responsibility for placement, lack of progress in therapy, the psychological evaluations showing that he has a personality disorder, the ample opportunity given to show that he can or has

made the requisite changes and that there has been no movement on Mr. Johnson's part to meet H.J.'s future and long-term needs, she believes that placement of H.J. with Mr. Johnson is dangerous and would be detrimental to H.J.

207. Ms. Baker testified that H.J. is integrated into the Dulaney home, and that it would be detrimental to remove her because of her need for consistency, stability, security and knowing that she's loved and will not be rejected. H.J. is not a possession; she has emotions and feelings and is being torn apart by her father's actions.

208. If the Court were to place H.J. with Mr. Johnson, Ms. Baker testified that she believes H.J. would be in danger both physically and emotionally. Ms. Baker is very concerned about the incident that took place at the last visit on February 15 - 16, 1992, because it exemplified Mr. Johnson's uncontrolled anger, continuing tendency to deal with H.J. in an inappropriate physical as opposed to appropriate verbal manner, and that H.J. is stubborn and manipulative enough to push her father to his limits. H.J. was and continues to be very angry with her father because he is here and she wants him to go away.

209. Ms. Baker is also concerned with Mr. Johnson's lack of progress toward recognizing the issues that led to the children's placement and his relationship with H.J. While Mr. Johnson has been saying he has changed, he has not backed it by his actions. Ms. Baker does not believe that what Mr. Johnson is saying is genuine or that he has the ability to truly look at H.J.'s needs above his own.

210. Because of the particular circumstances of this case, Ms. Baker testified that she believed that the goal for H.J. should no longer be reunification, but rather long-term placement or custody of H.J. with the Dulaneys. Ms. Baker believes that Mr.

Johnson is not a fit and suitable parent for H.J. at this time nor will he be in the reasonably foreseeable future and H.J. needs and deserves stability and permanency in her life.

Social Workers

211. Three social workers from DCDHS testified at trial: Sheila Skeels, the supervisor, Laura Pettey and Cindy Hillesheim. There were also at least two other social workers who at one time or another were involved in the Johnson file at DCDHS: Carol Stensrud and Holly Benda. The DCDHS file on this case presented as Exhibits 2, 43 and their updates at trial, along with the testimony of the social workers corroborated testimony by the child's therapist and guardian ad litem, the psychological expert, the Dulaneys, Glen Izawa and Harriet Nathan from Hawaii, and the child's maternal grandfather. All of the social workers testified that they believed it to be in H.J.'s best interest for the Dulaneys to be awarded custody of her and that it would be detrimental for her to be returned to her father in Hawaii.

212. Ms. Pettey testified first as to her involvement in the Johnson case from the initial child protection assessment and as the ongoing worker until her resignation from DCDHS in February 1991. Ms. Pettey discussed the issues and decisions made involving the children's school, diet, religion and medical needs during their first year in the Dulaney home and the efforts made by DCDHS and the children's guardian ad litem to accommodate the parents' wishes. She testified that it was much easier to work with Lucy Johnson because she had not left the state unlike Mr. Johnson and was not as zealous as Mr. Johnson in her demands regarding the children's diet and medical needs.

213. Ms. Pettey also testified as to the extent DCDHS went to arrange visitations when Mr. Johnson would arrive in

Minnesota practically unannounced for court appearances and expect extensive visitation with the children while in the area. Mr. Johnson rarely made visitation arrangements in advance, instead expecting DCDHS and the guardian ad litem to drop everything to arrange and supervise his visits despite clear notice from Ms. Pettey that advance arrangements needed to be made.

214. Ms. Pettey testified that in her opinion, the placement with the Dulaneys had worked out extremely well. Lucy Johnson and the children were very happy with the placement. The only one who opposed the placement was Mr. Johnson. She also testified that H.J. was integrated into the Dulaney home, loves the Dulaneys and they love her.

215. Ms. Pettey testified that the Dulaneys provided for H.J.'s best interest especially with their efforts regarding her school, medical and emotional needs, and respecting the religious preferences including dietary and worship restrictions by working Lucy Johnson and other church members. Ms. Pettey detailed the extensive efforts she and the Dulaneys undertook to take into consideration all of the important issues brought up by Mr. Johnson.

216. Ms. Pettey also testified as to her concerns about Mr. Johnson and his progress in working toward the return of his children to him. She stated that Mr. Johnson never acknowledged by part in his dysfunctional family and showed absolutely no insight as to why his children were fearful of him. Ms. Pettey indicated grave concern about the psychological evaluations and later counseling reports indicating Mr. Johnson's lack of progress in counseling.

217. The next ongoing social worker to testify was Cindy Hillesheim who was responsible for the file from March 1991 until March 1992. Ms. Hillesheim testified that after she

became involved in the case in March 1991, she observed both H.J. and J.J. with the Dulaneys and that the children followed their rules and expectations. She also saw genuine warmth and affection in their relationship that was missing when she observed H.J. with Mr. Johnson after the accident.

218. Ms. Hillesheim testified as to all of the efforts she made upon Mr. Johnson's return to Minnesota to facilitate visits between Mr. Johnson and his daughter, make visitation go smoothly and allow H.J. to want to and feel comfortable spending time with her father. Ms. Hillesheim met with the parties, was present at the commencement of most visits and had a chance to observe both H.J. and Mr. Johnson's behavior closely. Despite these opportunities, over time she saw H.J. pull even farther away from Mr. Johnson than before. As H.J. became more and more hesitant about going on visits, Ms. Hillesheim talked with the therapist, guardian ad litem and Diane Dulaney to try to get H.J. to go on visits. Ms. Hillesheim testified that H.J. told her she did not want to be with her father and was afraid of him now that J.J. was no longer around to protect her.

219. Ms. Hillesheim testified that she had contacts with the guardian ad litem, therapist, other social workers from DCDHS and Hawaii, and Rev. Roberts. She stated that her written report to the Court in September 1991 was a fair and accurate representation of the contacts and circumstances surrounding DCDHS reunification efforts.

220. Ms. Hillesheim testified that she was satisfied with the love and care H.J. received in the Dulaney home and based on her knowledge, contacts, time, information, and educational and work experience that it is her opinion that the Dulaneys would be better parents for H.J. The Dulaneys can provide stability, sensitivity, and caring that is necessary for H.J. to have a safe and

secure environment in which to grow. She also testified that she never observed any change, improvement or acknowledgement by Mr. Johnson regarding his role in the previous or current situation.

221. Ms. Hillesheim also testified that she never saw the Dulaneys, the guardian ad litem, therapist, or anyone else try to interfere with Mr. Johnson's relationship with H.J. or influence H.J. negatively against her father.

222. Ms. Hillesheim also testified that she was concerned by the questionnaire distributed by Rev. Roberts in Hawaii because one of the questions specifically asked about Mr. Johnson's parenting abilities in the last two years and none of the respondents could have observed anything because Mr. Johnson was in Hawaii and his daughters were in Minnesota during that time period. Also, although Rev. Roberts told her he saw a softening in Mr. Johnson, Mr. Johnson still did not admit, acknowledge or realize his responsibility for losing his daughters in the first place and without acknowledgement, Ms. Hillesheim did not believe that Mr. Johnson could make progress in establishing a good relationship with his daughter.

223. The last DCDHS worker to testify was supervisor Sheila Skeels who had supervisory responsibility for the Johnson case since the beginning and because of vacations, leaves of absence and changes in social workers, had also done an unusual amount of actual work on the file. Ms. Skeels testified as to the procedures followed on the file concerning the placement, reviews of placement, review of reports and documents, court recommendations and appearances and her presence at the trial.

224. Ms. Skeels testified that based on all of the information and reports available since placement, that even prior to the accident in July 1991, DCDHS had discussed and determined it appropriate to cease reunification efforts and pursue

long-term foster care placement for J.J. and H.J. in order to focus on the children's needs for permanence and stability because no progress was being made by the parents that would warrant continued reunification efforts. The specific concerns Ms. Skeels had regarding Mr. Johnson were that she had seen no progress by Mr. Johnson with a therapist or in counseling to show necessary attitude changes. Also, his relationship and communication skills with his children had not improved.

225. Ms. Skeels testified that since July 1991 Mr. Johnson has been in Minnesota and up until the trial commenced has had ongoing visitation with his child. She stated that Mr. Johnson had been very vocal he was not responsible for the placement of his children and has threatened countless times to sue Dodge County, DCDHS, and the State of Minnesota for keeping his daughter from him. Ms. Skeels has seen no change in Mr. Johnson's interactions with H.J. either in a therapeutic setting or on visits, in fact seeing just the opposite, that Mr. Johnson continues to be dogmatic, authoritarian and rigid in his dealings with her, as evidenced in his interaction with her at DCDHS on April 10, 1992.

226. Ms. Skeels testified that based on all of the information, files, testimony and her own educational background and experience, that custody of H.J. should be granted to the Dulaneys so that H.J. can have stability, permanency, safety, and security in her home environment, all of which she would lack if returned to Mr. Johnson. Ms. Skeels pointed to some specific behavior by H.J. such as her expressed fears of her father, bed wetting following counseling sessions or court-ordered visits with her father, tears and anger, and the fact she has been feeling some grief now regarding her mother's and sister's deaths because the lack of visits with her father have given her time to deal with these other issues.

Glen Izawa

227. Mr. Glen Izawa received his Bachelor's Degree in Psychology in 1968 and his Masters in Social Work in 1973 and has worked as a social worker with the Mental Health Division of the State of Hawaii for 19 years. His duties include psychotherapy, services to adults, and supervision of case managers. He first became involved with the Johnson family as early as 10 years ago. On one occasion when Lucy Johnson had been taken to Molokai General Hospital for holding until she could be transferred to Maui Memorial Hospital, Mr. Izawa testified that he witnessed Mr. Johnson physically abuse his wife by pulling and holding her hair when she tried to walk away. Mr. Johnson's explanations of the same situation appeared to be satisfactory to this Court.

228. Mr. Izawa's first professional contact with Mr. Johnson occurred in April 1990 when Mr. Johnson was referred to him for court ordered counseling for the purpose of discussing what had happened, and having Mr. Johnson acknowledge and understand the impact his abusive behavior had on his family. The counseling sessions were set up on a weekly basis and Mr. Izawa saw Mr. Johnson for approximately 18 - 20 sessions until June 1990. The first two or three weeks were used for history taking. Throughout their extensive therapy, Mr. Johnson failed to achieve the stated counseling goal. Mr. Johnson instead attributed his family difficulties only to his wife and asserted that corporal punishment was at times necessary when disciplining children.

229. Mr. Izawa testified that Mr. Johnson blamed others and minimized his actions. For example, Mr. Johnson blamed his children and wife for his having to discipline them so violently. Mr. Izawa stated that Mr. Johnson to recognize that discipline must be moderated by trust, judgment and respect. Mr. Izawa testified

that corporal punishment is an act of anger, violence, and abuse.

230. Mr. Izawa also testified that religious differences had no effect on their counseling and that Mr. Johnson intentionally placed his religion as a barrier between them which is typical behavior for an abusive man. An impasse was eventually reached in the counseling sessions because Mr. Johnson refused to acknowledge his behavior and continued to deny the impact it had on his family.

231. Although Mr. Izawa testified that even though Mr. Johnson called his daughters to apologize for placing his hand over their mouth and noses, that act was outweighed by Mr. Johnson's refusal to acknowledge his anger and other abusive behaviors. Mr. Izawa testified that Mr. Johnson's use of a switch was abusive because it hurts the child rather than correcting behavior. He also stated that spanking in any form is violence and corporal punishment is violence toward children.

232. When told about statements made by H.J. that she wanted to visit her father in Hawaii, Mr. Izawa testified that children often want their family to remain intact even if it is an abusive family. Later Mr. Izawa testified that Mr. Johnson dominated his wife and children and his abusive behavior crossed the line from providing guidance to being dominating and controlling.

Harriet Nathan

233. Another counselor involved on the Johnson case in Hawaii was Harriet Crofts Nathan, who also testified. Ms. Nathan earned her bachelors degree and a graduate degree from the University of Wisconsin in psychological services. Before moving to Hawaii, she worked on the Domestic Abuse Intervention Project in Duluth, Minnesota. On Molokai, Ms. Nathan worked in the

Alternatives to Violence program as a child and family therapist and group facilitator.

234. Ms. Nathan testified that she began working with Mr. Johnson on April 25, 1990 when he was referred to the program by Ms. Pettey with DCDHS. Mr. Johnson participated first in a parent education group led by Ms. Nathan and Sheila Awai who was also a Seventh Day Adventist. The purpose of that program was to assist parents in looking at and responding to their child's behavior based on the Systematic Training for Effective Parenting ("STEP program") which is educational in nature, focusing on positive reinforcement and giving children firm clear alternatives in order to develop self control, responsibility, and the ability to make decisions. Mr. Johnson attended all eleven two hour group sessions in weekly meetings from May 31 through August 8, 1990, was a punctual, courteous and attentive group member and clearly read and understood the material presented.

235. Ms. Nathan also met with Mr. Johnson for two individual sessions because she was concerned that the educational material being presented in the classes were not changing Mr. Johnson's mind regarding discipline. Mr. Johnson related to Ms. Nathan the need to use a switch for spanking, because "if it doesn't hurt a little it won't do any good." Although Mr. Johnson did tell Ms. Nathan he had called his daughters to apologize for covering their mouths and noses after she had told him that she would be terrified if someone had done that to her, one month later in describing in group a violent incident with his children he defended his methods as necessary since "there is a price to pay for rebellion" and "parents in love must discipline their children."

236. Mr. Johnson also attended group sessions led by Mr. Izawa and Ms. Nathan to teach anger management skills to parents who have abused their children, and to examine the

differences between controlling children through fear, and controlling them through guidance and influence. Mr. Johnson was very defensive and insisted that he did not belong in the group because he never disciplined his children in anger.

237. Ms. Nathan testified that for a short time, Mr. Johnson opened up and they seemed to be breaking through his denial and accepting responsibility for his behaviors, but later brought a book whose philosophy on child rearing was dogmatic, directive and harsh, but he claimed backed his position. In a section starred and underlined by Mr. Johnson, entitled "The Rod is Sometimes Necessary," it states:

> Whipping may be necessary when other resorts fail, yet you should not use the rod if it is possible to avoid doing so. (It should only be) to bring the child to his senses, to show the child that he does not hold the lines of control . . . Every fault uncorrected will bring unhappiness to himself and displease God . . . Make no compromise with evil.

Ms. Nathan testified that this led to Mr. Johnson having an even more polarized position of righteousness and becoming even more rigid, authoritative, and dominating. She feared to think of how often "the rod" would be deemed necessary when the children (now H.J.) become teenagers and some forms of rebellion are normal.

239. Ms. Nathan testified that initially she felt sorry for Mr. Johnson because his wife was mentally ill, but after observing his attitude toward her, meals and discipline she wondered how much Lucy Johnson's mental health problems were worsened because of the abuse in the house and Mr. Johnson's attitude and behavior.

240. Ms. Nathan also testified that Mr. Johnson needed psychiatric counseling to realize his part in his dysfunctional family and that the family situation would be worse now if Mr. Johnson were to have custody of H.J.

Diane and Mark Dulaney

241. Diane Dulaney testified that Leah, the Dulaney's oldest daughter, was born during her junior year in high school in Minneapolis, Minnesota. Although Mark Dulaney is Leah's father, Mr. and Diane Dulaney did not get married at this time, waiting instead until both had graduated from high school and Diane Dulaney had received her license to be a practical nurse.

242. The Dulaneys live twelve miles east of Owatonna on six and one-half acres of rural land, including a pasture for their livestock. They have an oak tree covered plot with an older home that they are continually remodeling.

243. In early to mid October 1989, the Dulaneys received a telephone call from Ms. Pettey asking if they would consider taking placement of two little girls. Diane Dulaney asked to be briefed on the situation and Ms. Pettey filled her in on the details including:

a. The physical abuse.
b. The limitations on diet.
c. Their mother's problems with mental illness.
d. The father had left their mother.
e. The children had been living with members of the church that their family attended.

Mr. and Diane Dulaney decided that same day to take H.J. and J.J. as two other foster children were to be leaving their care on

October 13, 1989 to return to their homes.

244. On October 13, 1989 the children arrived at the Dulaney home, looking afraid and holding teddy bears. The children came with many explicit details regarding their care. There were pages of special recipes and explanations of what they had and had not eaten. The children could not eat dairy products, meat or sweets. These restrictions had originated with their parents.

245. The Dulaneys understood at that time that J.J., at age ten, was attending second grade at Strawberry Meadows, a Seventh Day Adventist church school. H.J., at age seven, was not sent to school because her parents did not believe she was ready for school because she had not developed to a point where she could handle tedious work. Initially Diane Dulaney was asked to work with H.J. at home on her letters and numbers because she had previously home-schooled two of her own children. Diane Dulaney was comfortable with this and used her own resources, Christian curriculum, and Lucy Johnson's curriculum distributed by "Rod and Staff."

246. J.J. attended Strawberry Meadow until the spring of 1990 when both she and H.J. were placed, by the children's guardian ad litem and DCDHS, in the Claremont public school system after being tested for grade placement. H.J. has done very well in school and has attained the level of her age-group peers although starting late. She is in third grade now and loves attending school.

247. When the Dulaney's first received H.J. in their home her health was very poor. During the two and one-half years H.J. has been with the Dulaneys, her health and appearance have improved dramatically. At the first sign of any health problems, Diane Dulaney's initial reaction was to deal with it in the way the Respondent and Lucy Johnson desired, such as alternating hot and

cold compresses to the chest, or administering different herbal teas. When H.J. did not respond and was still sick with a fever, Diane Dulaney would take her to the doctor at the Kasson Clinic, an extension of the Mayo Clinic. The usual diagnosis was strep throat and H.J. was put on medications.

248. The children had also not ever received their childhood immunizations when they arrived at the Dulaney home in the fall of 1989. Diane Dulaney testified that one time J.J. fell while at the Christenson's house and cut her chin. She was taken to St. Marys Emergency Room and stitched up. Lucy Johnson then instructed them to give her the immunizations she needed and a tetanus shot. Diane Dulaney was not sure if Lucy Johnson followed up on the immunization or booster shots.

249. After her sister's death, H.J. shared a bedroom with Melissa until Leah moved out at which time H.J. got her own bedroom.

250. Diane Dulaney testified that her efforts to respect and accommodate the children and their parents religious wishes included complying with visitations, getting the children ready for church activities, assisting with memory verses and projects, and having them appropriately dressed. She also encouraged the children to respect Saturday as the Sabbath. This continued up until the time J.J. was killed and continues now with H.J.

251. Diane Dulaney testified regarding the contact the children had with their mother stating that it varied depending on the circumstances and was monitored closely by DCDHS.

252. Lucy Johnson came to the Dulaney home to visit her children and to see the environment in which they were being raised. There were two actual visits that occurred at the Dulaney home, but usually Lucy Johnson just picked the children up for visits elsewhere and chatted with the Dulaneys a little before or

after the visit. Diane Dulaney testified that Lucy Johnson had visits once or twice a week when she was functioning well.

253. Diane Dulaney also testified regarding her contact with Mr. Teberg stating that he had visits whenever he was in Minnesota and had frequent telephone contact with the children when he was not in town.

254. Mark and Diane Dulaney's first contact with Mr. Johnson was when he telephoned from Texas to introduce himself and to speak with his children. Mr. Johnson called every two to three weeks. Mr. Johnson also sent postcards frequently to the children who would react to the pictures, but not to the content of the note he had written to them according to Diane Dulaney's testimony.

255. Diane Dulaney constructed scrapbooks for all of her children, so she also did one each for J.J. and H.J. because she had been saving items such as report cards, letters from relatives, postcards from Mr. Johnson, school projects, birthday information, ribbons from 4-H, and other important events in the children's lives. These scrapbooks were admitted into evidence as Exhibits 17 and 18. The major difference between the two scrapbooks was that Diane Dulaney had placed postcards in H.J.'s scrapbook that Mr. Johnson had given to her since the accident.

256. Diane Dulaney testified that she found these same postcards in the waste basket in H.J.'s bedroom. After confronting H.J., who said she did not want them, Diane Dulaney put them in a bag and placed them on bookshelves in H.J.'s room. Exhibit 19, a postcard of a deer, is the only postcard out of the rest that Diane Dulaney could find on the bookshelf when she later looked for the paper bag.

257. Diane Dulaney testified that H.J.'s bed wetting had become sporadic after the first six months she was placed with the

Dulaneys and decreased even further during the summer of 1990. In January 1991, the bed wetting started up almost every night as a result of H.J.'s apprehensions regarding the trip to Hawaii. In March and April 1991 the bed wetting tapered off again only to start up after the accident and Mr. Johnson's return to Minnesota in July 1991.

258. Diane Dulaney testified that she documented the bed wetting occurrences and found a pattern consistent with H.J.'s counseling sessions with Mr. Johnson and Ms. Guertin, visits with Mr. Johnson, court proceedings, and court-ordered visits which she has refused. Diane Dulaney stated that she does not attempt to correct the bed wetting behavior because it is just something that happens. H.J. knows that she is to bring her wet sheets down to the laundry and she must bathe before going to school, and this acknowledgment is in and of itself embarrassing enough for H.J.

259. The Dulaneys observed that both children sucked their thumbs when they were first placed in the Dulaney home and continued to do so consistently through January 1990. Around the time the children were placed in public school they both decided to stop their thumb sucking. Diane Dulaney testified that this was cause for a major celebration in the Dulaney home as John had been embarrassed to have an older sister (J.J.) who sucked her thumb.

260. Diane Dulaney testified that she worked with DCDHS, including Ms. Pettey, Ms. Hillesheim, and Sheila Skeels, among others, in caring for the children. The children also saw their therapist, Ms. Guertin, every other week at ZVMHC. The counseling sessions were with the children alone, later together, and then at one point Lucy Johnson was brought in to the sessions. After Lucy Johnson and J.J. were killed, Ms. Guertin incorporated Mr. Johnson into counseling sessions with H.J.

261. Diane Dulaney testified that she and her husband were responsible for transporting H.J. to her sessions. Diane Dulaney observed H.J.'s behavior after the sessions and stated that H.J. cried, whined and would say that she was hungry. H.J. was antagonistic with Diane Dulaney: kicking the ceiling of the car despite having her seat belt on, displaying uncomfortable frustrations and saying she was mad at her father because "he doesn't listen, it has to be his way, what he says is the truth." Diane Dulaney also testified that H.J. said she was angry because she thought she would bave to go back with him.

262. Diane Dulaney testified that prior to the accident, Mr. Johnson had visitation with the children whenever he would return to Minnesota for a court hearing. The Dulaneys observed Mr. Johnson on his initial visit with the children after they were placed in the Dulaney home. J.J. did not want to go saying she hated her father. H.J. would only go as long as Diane Dulaney went and stayed with her, so Diane Dulaney took H.J. to DCDHS where the visit was to take place and H.J. sat on her lap the whole time and was nervous and clingy with Diane Dulaney.

263. At the second visit, Mr. Johnson wanted to see the Dulaney's home. When Mr. Johnson came over they all played softball and Mr. Johnson walked on his hands. Later the children showed Mr. Johnson their bedrooms and collections. Diane Dulaney offered him some water (as it was between meals) and they sat around the table. Diane Dulaney testified that J.J., who had been sitting between Mr. Johnson and Mark Dulaney, got up and went over to Mark Dulaney, leaned up against him and then crawled up into a fetal position on Diane Dulaney's lap and laid there.

264. Diane Dulaney testified that she had telephone conversations with Mr. Johnson regarding the management of the

children's health and their physical needs. Mr. Johnson was critical of the way the Dulaneys were handling the children's needs as he did not like antibiotics being used on H.J. for her throat and ear infections.

265. Diane Dulaney testified that she and Mark Dulaney tried a few different churches after moving to Owatonna. They settled into an Assemblies of God church where they have been for over four years now. Diane Dulaney described her and her husband as being conservative protestants.

266. The Dulaneys involve their children in the church by having them go to Sunday School while Mark and Diane Dulaney attend Sunday worship. The Dulaney children have also been active in Missionette and boy's group on Wednesday evenings. Their oldest daughter has been very active in the missionary aspect of their church and has traveled to New York City, Mexico and to what used to be known as the Soviet Union. The Dulaneys also have a circle of friends from their church with whom they play volleyball, go on picnics and attend other types of social events.

267. Diane Dulaney testified that all the children, including H.J. and J.J., have had piano lessons. H.J. likes music, so Diane Dulaney sees a strength and talent that she would like H.J. to develop further. H.J. took piano lessons from the winter of 1990 until October 1991.

268. Diane Dulaney testified that her children are very aware of the court proceedings and are very supportive of the custody petition. H.J. and J.J. had told the Dulaney children enough background information on their childhood prior to foster care placement that the Dulaney children sense and realize the need for protection for H.J.

269. Diane Dulaney testified that J.J. had a conflict with

Mr. Johnson regarding her mother because she thought he had sent a letter regarding Lucy Johnson to people in the Seventh Day Church and that J.J. had written Mr. Johnson a letter regarding her concerns. On June 20, 1990, Mr. Johnson called and told J.J. that he did not write the letters. After Diane Dulaney asked Mr. Johnson to clarify his involvement, he stated that he had requested the letters to be written on his behalf. Mr. Johnson then had these letters photocopied and sent to church members, DCDHS and the Dulaneys. J.J. was very upset that her father was saying bad things about her mother.

270. Diane Dulaney testified that H.J. was very close and snugly with her biological mother. H.J. loved getting and giving back rubs, talking on the phone, and going on visits with Lucy Johnson. From Diane Dulaney's notes, shortly after the children moved into their home a one-sided conversation was recorded when H.J. was on the phone with Lucy Johnson. Diane Dulaney testified that H.J. said: "It's mostly Daddy - He makes you hurt J.J. and me. No, I like it here. Your fighting is why."

271. Mr. Johnson approached either Diane Dulaney or Ms. Pettey about a visit to Hawaii with Diane Dulaney supervising. Diane Dulaney testified that she understood the visit was for the children to have a good time with their father. Diane Dulaney was supportive and excited about the trip. Diane Dulaney testified that the children were afraid that their father was going to kidnap them and they wanted to make sure that she was with them. Diane Dulaney understood that they were to be staying at a home of some of Mr. Johnson's friends and one or two nights in a motel for a total of nine days. Diane Dulaney's goal was to see and enjoy Hawaii and to gain a better understanding of the children's father. DCDHS ultimately decided that the trip was permissible.

272. Diane Dulaney went on to describe the visit to

Hawaii. When she and the girls arrived, they were met by Mr. Johnson and his parents, brother Brian, and friends from his church. There was a full agenda of things to do such as sightseeing every day. They were very active and went hiking to falls, walking along river beds and the beach, boogie-boarding and snorkeling in the ocean, and even went on an airplane tour of the island.

273. Diane Dulaney testified that her impressions from this attempt to talk with Mr. Johnson on February 12, 1991 regarding reunification was that although she believed it could be possible, she thought it would take a miracle.

274. Diane Dulaney also met with Rev. Roberts and Mr. Johnson on February 13, 1991. She testified that Mr. Johnson justified his behavior with his children and used scripture to support his stance. Rev. Roberts recommended at that time that Mr. Johnson needed moderation in his life and Diane Dulaney testified that she was optimistic at that point that Rev. Roberts could persuade or teach Mr. Johnson different ways.

275. Diane Dulaney testified regarding her conversation with Mr. Johnson and the Larsons on her last day in Hawaii. Mr. Larson quizzed Diane Dulaney as to who she served, man or God, and wondered why she would not leave the children in Hawaii. Diane Dulaney also testified that Mr. Larson stated that Mr. Johnson needed to take matters into his own hands - that he had let the State of Minnesota go to far. Diane Dulaney stated that DCDHS told her to bring the children back and that it was to the children's benefit that DCDHS was in charge. Mr. Johnson and the Larsons then used scripture to back their position to the point where Diane Dulaney felt stressed and intimidated which she expressed to them. Diane Dulaney testified that finally she told them her husband had told her to bring the children back. At that

point they stopped pressuring her because they believe a woman should obey her husband which is exactly why Diane Dulaney used this reasoning.

276. Diane Dulaney testified that during the trip, the children were very antagonistic with their father and would pull away from him. After her conversation with Mr. Johnson and Rev. Roberts, Diane Dulaney talked with the children and asked them how they would feel about living in Hawaii with their father or in a foster home if he was willing to change. H.J. and J.J. cried and said no, that they would only live with friends in Hawaii.

277. Diane Dulaney testified that she was direct in describing the food deprivation when she talked with Mr. Johnson, but that he would deny some aspects and justify others. At that time Diane Dulaney was supportive of the children being placed with foster parents in Hawaii if Mr. Johnson showed progress with Rev. Roberts and a willingness to change. Diane Dulaney testified that she wanted to believe that the children would eventually be reunited with their parents and the idea of it being Lucy Johnson was grim at that point.

278. Although Mr. Johnson presented witnesses from Hawaii who testified on his behalf that Diane Dulaney wanted to leave the children with their father at the end of the visit to Hawaii and that she had no longer had misgivings about him, Priscilla Turner's testimony corroborated Diane Dulaney's testimony and that of the social workers involved at the time regarding Diane Dulaney's grave doubts about Mr. Johnson's continuing rigidity and dogmatic ways. Mrs. Turner and her husband had been friends with the Johnson family since moving to Molokai in 1982 and in fact had kept the children for an extended period when Mr. and Lucy Johnson were unable to care for them.

279. Following her return to Minnesota, Diane Dulaney talked with Rev. Roberts on a few occasions. She testified that she received no assurances from him that Mr. Johnson was making progress and in fact Mr. Johnson was unwilling to recognize change or take instructions from others. In subsequent conversations Diane Dulaney had with Mr. Johnson, she told him she saw no change or progress and that she was not supportive of the children being placed in foster care in Hawaii.

280. In the Spring of 1991, DCDHS talked with the Dulaneys regarding long-term placement of the children in their home. This was still being contemplated at the time of the accident in July.

281. In August 1991, the Dulaneys decided to take legal action because if they did not, H.J. would be going back to Hawaii. Diane Dulaney testified they were motivated by their love and concern for H.J. and if she were returned to Hawaii that she would be subject to Mr. Johnson's rigid and controlling ways. They felt no one, especially a little girl like H.J., should be subjected to that kind of treatment.

282. Diane Dulaney testified she and her husband expected to raise H.J. with all the love and caring they can give her.

283. In testifying as to H.J.'s educational needs, Diane Dulaney testified Leah had been educated within the Claremont Public School system until tenth grade when she switched to Owatonna public schools because the art program at that high school fit her needs better. Melissa has been educated in the Claremont system except for third and fourth grade when she was home-schooled. She has now been attending the Owatonna Junior High School for one year now. John was home-schooled to third grade at which time he entered the Owatonna Christian School

which he continues to attend.

284. The Dulaneys would like to see H.J. attend the Owatonna Christian School with John. The school is Baptist-based and is a fundamental Christian school for kindergarten through twelfth grade. There are twenty to twenty-five students per class and there is a high level of respect given to the teachers. Academics, music and Christian principles are stressed. Diane Dulaney testified that H.J. will need special handling and she believes this can best be met at Owatonna Christian School.

285. Diane Dulaney testified regarding her part in the visitation arrangements and that she informed DCDHS what H.J.'s basic needs were as far as return times being appropriate for her bedtime schedule. Diane Dulaney did not impede, but rather encouraged, visitations. After the accident H.J. was resistant and angry about the visits with her father. She eventually became compliant for a while, but returned to being resistant and angry as the custody proceeding progressed because she was concerned and frustrated that she would be sent to Hawaii.

286. Diane Dulaney testified that H.J. openly expresses her frustrations and anger at the possibility of being reunited with her father and that she feels vulnerable because J.J. is no longer around to protect her.

287. Diane Dulaney testified that she believes it would be in the best interest of everyone for H.J. to come to terms with her anger and to heal that area would benefit H.J. especially as well as everyone else. Diane Dulaney believes that resolving the custody issue will help too because H.J. is trying to sustain her safety and security she feels with the Dulaneys. Diane Dulaney testified that if the Court were to grant the Dulaney's Petition for Custody, she believes that it will be easier for H.J. to deal with her father because then she will know she is staying with the

Dulaneys. Diane Dulaney testified that she would encourage H.J.'s relationship with her grandparents on both sides if the Court granted the Dulaney's Petition and awarded them custody of H.J.

288. Diane Dulaney testified she and her husband cooperated with Dr. Philip and saw him on two occasions. She testified that contrary to Dr. Philip testimony of his recollection of the second visit, when Mr. and Diane Dulaney arrived, H.J. was in another room. When Dr. Philip and H.J. came into the room where the Dulaneys were, H.J. immediately went over and sat on their laps. After a while H.J. got up to get some things to play with and at that time Dr. Philip asked the Dulaneys to go into another room.

289. Diane Dulaney testified she heard Dr. Philip misstate several of the Dulaneys' statements as he wrote them down because he wrote very slowly and talked out loud as he recorded what he "thought" he heard. She also had the impression Dr. Philip had received outside information on her family because he asked specific questions about Leah, their oldest daughter, and her living arrangements.

290. Diane Dulaney also testified regarding a letter H.J. had written to her father referencing a will. When DCDHS contacted Diane Dulaney regarding J.J.'s belongings that H.J. did not want, Ms. Hillesheim told her to pack those up so DCDHS could send them to Mr. Johnson. Diane Dulaney included J.J.'s bank statement book because she was not aware that J.J. had earlier expressed she wanted her money to go to her mother or her sister if anything happened to her and had specifically stated the money was not to go to her father. J.J. and H.J. were very proud of their bank accounts, and H.J. was very upset when Diane Dulaney sent J.J.'s bank book to Mr. Johnson and wrote him the letter that was Exhibit 9.

291. Diane Dulaney testified DCDHS was extremely encouraging to H.J. to visit with her father. There was no adverse influence by either the Guardian or the therapist. Ms. Guertin was very gentle with the children. Diane Dulaney also testified that Mark Dulaney never attempted to poison the children's minds with respect to their father. Mr. and Diane Dulaney each offered the children a safe place where they could talk about their father or share secrets, but they never once undermined the children's relationship with their father.

292. Mark Dulaney testified he heard his wife testify and there was no misleading, confusing or inaccurate testimony and he agreed with all of it.

293. Mark Dulaney testified that he asked Dr. Philip what other information he had been provided about the Dulaneys in advance of meeting with them because of his questions regarding Leah, the Dulaney's oldest daughter. Dr. Philip asked at one point whether she was living at home when they had given no indication of the problems they had been having with her desire to move out on her own. When the Dulaneys responded that she was living with a friend and her family, Dr. Philip said, "oh, she's living with her boyfriend." The Dulaneys then said, "no." Mark Dulaney then said to Dr. Philip that he must have received this information from Mr. Johnson, but Dr. Philip denied this.

294. Mark Dulaney testified that H.J. was treated equally with the other children in his home. He is willing to bear the expense of raising H.J. including providing a college education. Mark Dulaney further testified that his and his wife's decision to pursue custody was not contingent upon Mr. Teberg providing the money for attorneys' fees. He also stated he feels strongly that H.J. needs to come to terms with her father, through counseling or whatever it takes, and the sooner the better it will be for her.

Jack Teberg

295. Mr. Teberg's observations of Mr. Johnson during the period he visited the family in Hawaii was that at first he and Mr. Teberg's daughter seemed very happy in their marriage, but the stress increased as time went on -- especially once they began having children.

296. Mr. Teberg also observed his grandchildren on these visits. He testified that they seemed fairly happy, but were always hungry, never remembering a time when they weren't hungry. Mr. Teberg said that the meal program he observed on his visits were twice a day, at 9:00 a.m. and 2:00 p.m. When the family would visit him at the hotel he was staying at on the island, they would all eat at the salad bar with the children stuffing themselves and occasionally hiding food in their pockets or down their dresses without their parents knowledge, so they would have something to eat later.

297. Mr. Teberg noticed the children's unusual physical appearance during his trips to Hawaii. He testified that they had distended stomachs, their hands and feet were deep yellow, the rest of the skin on their bodies was yellowish, and they were very skinny.

298. Once the Johnson's moved to Minnesota, Mr. Teberg had even more frequent contact with them. Since 1988 he has made approximately fifteen visits here to Minnesota. Mr. Teberg regularly spoke by telephone with the Johnson family, almost every Sunday. At first, this was the whole family. Then after the children were no longer with their parents, he spoke with his daughter and Mr. Johnson. After Mr. Johnson left for Texas, Mr. Teberg would speak with the children when they were visiting with their mother on Sundays or were with the Dulaneys, and after the accident to just H.J.

299. Mr. Teberg testified at the trial that he still desires to see H.J. raised in the Dulaney home. He joined in the request that they be granted H.J.'s legal and physical custody.

Witness Credibility

300. The Court has considered the following factors in evaluating the credibility of all witnesses:

a. Their interest or lack of interest in the outcome of the case;

b. Their relationship to the parties;

c. Their manner and appearance;

d. Their age and experience;

e. Their frankness and sincerity or lack thereof;

f. Their reasonableness or unreasonableness of their testimony in light of all the other evidence in their case; and

g. Any impeachment of their testimony.

301. The witnesses called by Mr. and Diane Dulaney and the guardian ad litem were credible. The child's therapist and the guardian ad litem, along with the psychological expert on the parenting evaluations and the social workers all testified that it was in the child's best interest that she remain in the Dulaney's custody.

302. The Respondent called as witnesses on his behalf Dr. Philip, his father and step-mother (Robert and Jo Johnson), his sister (Katie Smith), Wendy Beckett, Harold Roberts, Linda Christenson, Kathy and Tommy Larson, Marybeth Mosier, and Irene Felker. These witnesses' testimony did not convince the Court that it was in the child's best interest to be returned to her father, rather their testimony relied heavily upon his statements to

them, and on the fact that H.J. was Mr. Johnson's biological daughter, so that in their view it was his God-given right to have her with him. Marybeth Mosier, prior to the placement of the children in the Dulaney home, notified the DCDHS of her concerns for H.J. and J.J. and the treatment by their parents. Ms. Mosier was a forthright witness who now believes that Mr. Johnson should be allowed to raise his remaining daughter. Linda Christian also wants Mr. Johnson to be given the opportunity to raise H.J. She testified that Jay Johnson has changed within the time period shortly before trial. She now finds that he is willing to listen. She candidly admits that Mr. Johnson would not follow suggestions from her before because she was a woman. Wendy Beckett, the Hawaiian social worker testified on behalf of Mr. Johnson. She was totally for Mr. Johnson, but lacked any understanding of the interaction of H.J. and Mr. Johnson and without any knowledge of H.J.'s needs.

303. Dr. P. P. Philip testified as the expert on behalf of Mr. Johnson. Dr. Philip evaluated H.J., Mr. Johnson and Mark and Diane Dulaney by interviews, the results of Sentence completion, Shipley Hartford, Bender Motor Gestalt, Rorschach, Thematic Apperception Test (TAT) and the MMPI for the adults and sentence completion, TAT and House tree person drawing tests for H.J., reviewing various records and reports and observing the interaction between H.J. and the adults in her life. In his analysis, Dr. Philip relied primarily on the TAT cards, placing the greatest emphasis on the blank card. Dr. Philip used his own interpretations with no scientific back-up of the parties' responses as opposed to the Exner Scale or Jane Levinger's analysis which Dr. Friedrich relied upon in his evaluation. Dr. Philip testified that he took everything Mr. Johnson told him for the truth and discounted the several inconsistencies in this information that was

pointed out to him during his testimony. The evaluation process and observation of the interaction of the Dulaneys and H.J. was handled differently than the way Dr. Philip tested, observed and evaluated Mr. Johnson with H.J. Dr. Philip's evaluation, test results, conclusions and testimony were not credible.

304. The interests of H.J. Johnson are paramount and outweigh the interests of Mr. Johnson pursuant to Wallin v. Wallin, 187 N.W.2d 627 (Minn. 1971), In re the Custody of N.M.O., 399 N.W.2d 700 (Minn. Ct. App. 1987), and Minnesota Statutes Section 518.17, Subd. 1.

Best Interest Standard

305. The court considered and evaluated the following relevant factors listed in Minnesota Statutes Sections 257.025 and 518.17, Subd. 1, in determining the best interest of the minor child:

(a) The wishes of the party or parties as to custody;

(b) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(c) the child's primary caretaker;

(d) the intimacy of the relationship between each party and child;

(e) the interaction and interrelationship of the child with a party or parties, her siblings, and any other person who may significantly affect the child's best interests;

(f) the child's adjustment to home, school, and community;

(g) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(h) the permanence, as a family unit, of the existing or proposed custodial home;

(i) the mental and physical health of all individuals involved; and,

(j) the capacity and disposition of the parties to give the child love, affection, and guidance and to continue educating and raising the child in her culture and religion or creed, if any.

306. The Court specifically finds that it is in the best interest of H.J. Johnson that custody be awarded to Mark and Diane Dulaney based upon the following relevant factors:

a. Mark and Diane Dulaney have clearly shown a great desire to parent H.J. Johnson, by their actions in providing for all of H.J.'s needs over the past two and one-half years and by bringing this Petition for Custody in order to protect H.J. from being returned to the Respondent's custody. The child's biological father, the Respondent, also has stated a strong desire to parent H.J., but given all the testimony, it is clear that his desire to parent is not based upon empathy with H.J.'s needs, but rather on his own self-centered needs.

b. H.J. Johnson has stated a clear preference to remain with Mark and Diane Dulaney and to not live with the Respondent. This preference has been evident since very early on in the case, perhaps since DCDHS spoke to her on September 14, 1989. H.J. has not been adversely influenced by any person(s) against the Respondent. While only nine years old, H.J. is of sufficient age to express a preference concerning who she should live with, although that preference should not be the deciding factor in a custody case.

c. The child's primary caretaker was identified by Dr. Friedrich, Ms. Guertin, and Ms. Baker as Diane Dulaney.

Although Respondent argued at trial that he had been H.J.'s primary caretaker, evidence was presented to the contrary showing that in fact Lucy Johnson had been the primary caretaker while both children were in Mr. and Mrs. Johnson's care as shown by the Respondent's inability to care for the children during Lucy Johnson's periods of mental instability or when she was hospitalized and by his failure to oppose his wife's demand for custody in her Petition for Dissolution of Marriage.

d. There is a strong parent-child bond between H.J. and the Dulaneys. In fact, the issue of H.J.'s attachment to Diane Dulaney was being dealt with prior to Lucy and J.J. Johnson's death and has been clearly accelerated due to this custody case. Ms. Guertin testified that even before Lucy Johnson was killed, H.J. had already told her that she had never been loved by anyone as much as Diane Dulaney loved her. H.J. also considers Mark Dulaney to be her father-figure and the one who she most respects and obeys. H.J. and the Respondent do not have any intimacy in their relationship as H.J. is afraid to be alone around him because her older sister is no longer alive to protect her from his anger. She will not even permit him to hold or hug him; unlike with the Dulaneys, with whom she cuddles with and hugs daily.

e. H.J. Johnson's interaction and interrelationship with the Dulaneys, their children, and extended family is extremely close. There was ample testimony of experts and others exemplifying the close relationship she has with the Dulaneys, especially Mrs. Dulaney in that from early on in the foster care placement, H.J. clearly identified Diane Dulaney as her psychological parent. H.J. also considers Leah, Melissa and John Dulaney to be her sisters and brother. The whole family was extremely affected by the deaths, especially their sister J.J.'s, and understands much of the grief and sadness currently being felt by

H.J. as J.J.'s thirteenth birthday just passed on May 28, 1992. The testimony presented showed that the interaction between H.J. and the Respondent was competitive and ambivalent as shown by the incidents that occurred on a visit on February 14 and a meeting at DCDHS in April. Dr. Friedrich testified that Respondent "is a remarkably self-centered, rigid, and rejecting man who is ambivalent about his relationship with his daughter, and who shows no openness to change given the fact that he fears decompensation if he does."

f. H.J. is clearly integrated into the Dulaney household, enjoys and is thriving academically in the school she is attending, and is very happy and settled in the community, including involvement in various activities such as 4-H, swimming and attending local sporting activities with her family. On the other hand, H.J. has an ambivalent relationship with the Respondent and even after nine hours of joint counseling, that relationship has not improved.

g. H.J. Johnson has lived in a stable environment for over two and one-half years now since her placement in October 1989. The testimony was clear that up until that time, H.J.'s life had been chaotic, unstable and unsatisfactory, and that one of the attachment issues with Mrs. Dulaney was because of the stability and continuity provided by the atmosphere in the Dulaney household. Prior to H.J.'s placement with the Dulaneys, specifically within the last year living in Minnesota, the environment and atmosphere in the Johnson home was chaotic and unstable. Whether you look at the last year or so after the Johnson family left Hawaii or whether you look at it while the Johnsons were in Hawaii with Mrs. Johnson's mental illness clearly affecting the stability of the home, it was the Respondent's clear choice to place the children with others and care for his needs and his wife's

multiple times in his life.

h. The Dulaneys have lived in their family home for twelve years now. The Respondent has lived in Southern California, Canada, Minnesota, Texas and Hawaii just since the Spring of 1988. Even when H.J. was in her biological parent's care for the first six or so years of her life, she was often sent to friends or relatives because the Respondent and his wife were unable to cope with her and her sister.

i. The Dulaneys are healthy both mentally and physically with no major personality difficulties. Respondent is a personality disordered person. Dr. Friedrich concluded that Respondent is "an extremely narcissistic individual" who finds it "very difficult to establish and maintain deep, meaningful interpersonal relationships." Dr. Friedrich went on to state that Respondent is "overwhelmed by internal distress" and has a "limited capacity for control."

j. It is clear from the testimony and testing that Mark and Diane Dulaney have the capacity and disposition to give H.J. love, affection and guidance in her life, as they have done in the past since she came to live with them. Mark and Diane Dulaney clearly identify H.J.'s needs and are able to empathize with her and give her a caring environment within which she will be able to grow and develop. The Dulaney's attend a Fundamental Christian church, but will respect H.J.'s desires to attend the Seventh Day Church if she so chooses. It is clear that the Respondent, however, is unable to understand and comprehend H.J.'s needs and desires as well as empathize with her situation. The Respondent is self-centered and would attempt to rigidly control H.J. and fit her into his mold of what her behavior should be as opposed to recognizing, appreciating and providing for both H.J.'s physical and emotional needs. While the Respondent places a great deal of

emphasis on his Seventh Day religious background and H.J.'s "ethnic" heritage, Respondent himself was not raised as a Seventh Day Adventist and he chose that religion late in his teens or early twenties after studying a great variety of religions. Religion is not a cultural or ethnic factor as envisioned under the statute.

CONCLUSIONS OF LAW

1. The Respondent Jay Johnson is not a fit or suitable parent, as contemplated by Minnesota law, to have custody of his remaining minor daughter, H.J.

2. It is in the best interests of the child, H.J., as provided under Minnesota law, that her permanent legal and physical custody be granted to the Petitioners Diane and Mark Dulaney, subject to reasonable visitation rights of the Respondent under such supervision and at such times as deemed appropriate by the Dodge County Department of Human Services upon consultation with the Dulaney's.

3. Robert and Jo Johnson may be and hereby are granted visitation with H.J. in Minnesota. In addition, the Court would encourage H.J. to visit her grandparents in Hawaii.

4. Petitioner's motion to remove from the Court file Dodge County's Proposed Findings of Fact and Order and Memorandum of Law may be and hereby is denied. The balance of Petitoner's motions dated June 5, 1992, may be and hereby is denied.

5. The child no longer being dependant or in need of protection, the CHIPS proceeding herein is dismissed.

6. The Respondent has a duty to pay child support for the support of his minor daughter. The Court reserves this issue for later determination.

7. The attached memorandum may be and hereby is

incorporated by reference herein.

ORDER FOR JUDGMENT

Let Judgment be entered accordingly.

Dated: August 28, 1992.

BY THE COURT:

/s / Lawrence E. Agerter
Honorable Lawrence E. Agerter
Judge of District Court

JUDGMENT

I hereby certify that the foregoing Conclusions of Law constitute the Judgment of the Court in these proceedings.

Dated: August 28, 1992.

COURT ADMINISTRATOR

By: /s / Pauline J. Huse

Filed
District Court - Dodge County
Date: Aug. 28, 1992
Pauline J. Huse
By: /s/

MEMORANDUM

This was an extremely long child custody case, which originally arose out of a CHIPS petition filed with the Dodge County Department of Human Services on November 9, 1989. Since October 13, 1989, through the present, H.J. has been in foster care with Mark and Diane Dulaney, who are the Petitioners in this custody matter. J.J., the eldest daughter, was in foster care from October 13, 1989, to the date of her death on July 6, 1991.

After the death of Lucy Johnson and J.J. on July 6, 1991, Respondent-father Jay Johnson retained Brian Peterson as his attorney. At the hearing on August 8, 1991, the parties argued various positions as to the disposition regarding the remaining daughter, H.J. The position of Dodge County Department of Human Services was different from that advocated by the Dodge County Attorney's office on that date. Mr. Johnson urged the Court to terminate jurisdiction and return H.J. to him in the State of Hawaii forthwith. Guardian Ad Litem Gail Baker, based on the reports from the therapist and the social worker, argued that H.J. had bonded to the foster parents and that some permanent placement of the child should be made here in Minnesota. Subsequent to August 8, 1991, Mark and Diane Dulaney (foster parents) filed their Petition for Custody. The Custody Petition was consolidated with the CHIPS proceedings in September of 1991. Thereafter, commencing on February 24, 1992, the current contested custody proceeding was heard by this judge with the parties being present for a full 15 days of trial time. The

Filed
District Court - Dodge County
Date: Aug. 28, 1992
Pauline J. Huse, Court Administrator

Court heard from all of the witnesses produced by the Dulaneys in support of the Petition for Custody, and the foster parents; Respondent's witnesses, including the witnesses in Hawaii who were heard by telephone conference. In addition thereto, the Guardian ad Litem called Dr. Friedrich and Marcia Guerten. Department of Human Services called Sheila Skeels to testify on behalf of the Department's position.

As the trial judge, I find it unfortunate that we had to spend 15 days of actual trial time on this case. Originally, I was inclined to the view that efforts should be made to reunify H.J. with her father Jay Johnson, with the ultimate goal of returning H.J. to the state of Hawaii. However, after reviewing the testimony and the exhibits in this case, this Court has ultimately concluded that the Dulaney's Petition for Custody of H.J. should be granted and that this ultimately is in H.J.'s best interest. The Findings as pronounced by this Court do support this conclusion. The Guardian ad Litem, H.J.'s therapist, and Dr. Friedrich all strongly advocate this position. In addition thereto, all the social workers that have testified and worked on this case from the Dodge County Department of Human Services support the Dulaney's custody petition.

This Court has decided that the "best interest of the child" is the appropriate standard to be applied in a child custody dispute between a third party and the biological parent. Minn.Stat. Sect. 518.156, Subd. 1(b) authorizes a person other than a parent" to petition for custody. In Re: M.A.L 457 N.W.2d 723 (Minn. App. 1990). Such a petition by a party who is not a relative of a minor child has been sanctioned by the Minnesota Supreme Court. Durkin v. Hinich, 442 N.W.2d 148 (Minn. 1989).

The case of Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971), sets out the two basic principles employed by the

Minnesota Supreme Court in deciding custody disputes between a parent and a third person. The first doctrine is that a parent is entitled to custody of his or her children unless it clearly appears that he or she is unfit, or has abandoned his or her right to custody, or unless there are some extraordinary circumstances which would rquire that he or she should be deprived of custody. The second doctrine is the best interest of the child concept, according to which the welfare and interest of the child is the primary test to be applied in awarding custody.

As between the two doctrines, the Minnesota Supreme Court has held in Wall in that the latter, the "best interest of the child" is clearly superior, stating:

> "[t]he principle that the custody of young children is ordinarily best vested in the [parent], vital and established as it may be, is distinctly subordinate to the controlling principle that the overriding consideration in custody proceedings is the child's welfare."

Even if the Court were to find the Respondent fit, the correct basis for a determination of custody is an application of the best interest standard to H.J.'s situation. In applying this standard, it is not necessary for the Court to find the biological parent unfit. This Court has concluded that the Respondent is unfit to have the custody and care of H.J. Even when a biological parent is not clearly unfit to have custody, other circumstances may dictate that a third party should be awarded custody. Tubwon vs. Weisberg, 394 N.W.2d 601 (Minn. App. 1986). The Court of Appeals in Tubwon employed the second part of the Wallin test, and "the best interests of the child" clearly predominated over the first part regarding the notion of special rights of the biological parent. This Court has considered the factors in determining what is H.J.'s best interest as are set out in Minn.Stat. Sect. 518.17, Subd. 1, and

the Findings clearly support the Dulaney's custody petition.

Respondent's Memorandum of Law received by this Court June 2, 1992, and other arguments advanced by the Respondent attacked the integrity of the Dodge County Department of Human Services. The Dodge County Department of Human Services did not comply with Minn.Stat. Sect. 257.071, Subd. 2 on review of the six months placements, did not comply with Minnesota Department of Human Services Regulation part 9560.0610 sub-part 3. In addition thereto, Respondent claims the efforts of Dodge County Department of Human Services may have been poisoned by gender discrimination, which influenced their efforts to place the children with Lucy Johnson, despite the children's fear of her and their unwillingness to spend extended time with her. The failure may have been based upon religious discrimination against Jay Johnson, because of his more strict beliefs about diet and other Seventh Day Adventist religious doctrine. This Court notes that the three social workers testifying on behalf of the Dodge County Department of Human Services were all female employees, and in addition thereto, the child's therapist is female, and the child's guardian ad litem is female. Mr. Johnson did in fact have difficulty working with the social workers, the therapist, and the guardian. Even though I cannot find that Human Services either had a plan to reunite the children with their father Jay Johnson and made little, if any, effort in that direction; the Court can still find that Mr. Johnson had the opportunity. Mr. Johnson in fact did cooperate by going to the counseling in the State of Hawaii with Glen Izawa and through Harriet Nathan's violence classes. However, Mr. Johnson effectively sabotaged this involvement, and the Court can readily find that he did not progress in counseling with Glen Izawa and Harriet Nathan. The Court cannot buy Mr. Johnson's belief that there was only a

religious difference between him and Izawa. In early 1991 when the children and Diane Dulaney visited the Respondent in Hawaii, the only information available to the Department of Human Services in Dodge County was that Mr. Johnson had made no progress in counseling.

Mr. Johnson may be correct that the visit went extremely well and the girls were pleased to visit the State of Hawaii. The therapist and the guardian ad litem were told by the two children that they did not want to be left alone with their father in the State of Hawaii, and that they feared him. On the visit to Hawaii, Diane Dulaney candidly admits that if it was left to her she would have preferred to see the children reunited with Jay Johnson as opposed what was happening with Lucy Johnson back in the State of Minnesota. Jay Johnson and the Hawaiian people should have realized that it was not Diane Dulaney's decision to leave the children in the State of Hawaii, but that decision had to be made back in Minnesota by the Department of Human Services and/or the Court.

There is no doubt in the Court's mind that pressure was brought to bear on Diane Dulaney when she was in Hawaii, and this is readily confirmed by Pricilla Turner in her testimony before the Court. In addition thereto, Pricilla Turner relates that Diane Dulaney had real concerns about Mr. Johnson, even though the Respondent had been in counseling with Reverend Roberts since December of 1990, no reports were furnished to the Department of Human Services prior to the verbal report by Reverend Roberts the day before the April 13, 1991 hearing. Reverend Roberts was not positive as to the progress Mr. Johnson was making at that time. At the same time, the reunification efforts with Lucy Johnson had been on a roller coaster back in Minnesota. Unbeknownst to the Court, the Department and the guardian ad litem were discussing

the possibility of long-term placement of the children. Unfortunately, the tragic death of Lucy Johnson and J.J. occurred on July 6, 1991, which brought this matter to a head and rapidly proceeded into the custody proceeding to determine who should have custody of H.J.

Mr. Johnson indicates the happiest years of his life were the years that he was married to Lucy Johnson in the State of Hawaii before the Johnson family left on the odyssey which led them into California, British Columbia and, ultimately, into Minnesota. Mr. Johnson has been found by this Court to minimize his own involvement in the problems that led up to the removal of the children, casting the entire blame on Lucy Johnson. Mr. Johnson effectively has persuaded certain people in Hawaii and also the Mosiers, the Christiansons, Irene Felker, and other people in the State of Minnesota that the entire problem was Lucy Johnson and not Jay Johnson's.

However, Jay Johnson conceded from the stand that the few months preceding the removal of the children and the voluntary placement in the Christianson's home was a terrible ordeal in the Johnson home, and the children had been hurt by what was going on in the Johnson home. Jay Johnson admitted his involvement of the discipline that has been outlined in the Findings which led to the finding of neglect that brought J.J. and H.J. under the jurisdiction of the Court. Mr. Johnson spent a lot of time trying to convince this Court that J.J. and H.J. were not reliable on certain occasions and did not tell the truth. In addition thereto, Mr. Johnson attempted to convince this Court that H.J. was now poisoned by apparently Jack Teberg, the Dulaneys, the guardian ad litem, and anyone else that was called as a witness on behalf of the Dulaneys. The more credible evidence in this case is that H.J. has not been poisoned against her father. In fact, Diane Dulaney

concedes that H.J. has to resolve her feelings towards her father, and the sooner the better.

Jay Johnson also attacks the role of the guardian ad litem. The guardian ad litem was the petitioner on the wrongful death case wherein a petition was filed with the Court to have Gail Baker named as a guardian of H.J. and also the trustee to bring the wrongful death action. Mr. Teberg was also involved in this process. This same judge signed the documents on an ex parte order, without notice to Mr. Johnson. This Court made available all of this information to Mr. Johnson and his attorney, and the wrongful death case trusteeship order appointing Gail Baker was vacated following a hearing where Mr. Johnson was represented.

The Court did not remove the guardian ad litem in the present custody case because she had established a relationship with J.J. and H.J. for a period of over one and one-half years, and to remove the guardian ad litem shortly after the death of H.J.'s mother and J.J. would have been detrimental to H.J. in the long run in this Court's opinion. The Court is satisfied that the Guardian ad Litem Gail Baker has fully and fairly represented the interests of H.J. throughout these proceedings.

Mr. Johnson also attacks Mr. Teberg and Mr. Downing, and obviously there is testimony that Mr. Teberg may be in fact financing the Dulaney's custody petition. It is fairly obvious to the Court that Mr. Teberg has been apprehensive about the prospect of Jay Johnson obtaining custody of H.J. based upon a long history. Mr. Teberg's concerns were not without foundation. As the maternal law grandparent, Mr. Teberg, and, for that matter, the entire Teberg family has supported Dulaneys in the custody petition. Rather than seeking custody for himself, Mr. Teberg frankly admits at least in his opinion the custody is best left with Dulaneys and that H.J. was receiving the best care, support and

love that she could receive.

Mr. Johnson retained Dr. Philip as his expert. Dr. Philip has a bias in favor of natural parents. Dr. Philip had access to most of the reports in this case, and it is interesting that Dr. Philip would either choose to ignore the initial reports by J.J. and H.J., which are documented in Findings 15 and 16, and of the report documented by Mr. and Mrs. Christianson in Finding 17. Dr. Philip also finds appropriate the way Mr. Johnson handled his wife Lucy Johnson with her mental illness.

On the other hand, Dr. Philip criticizes the Dulaneys and in particular makes reference to the Dulaney's oldest daughter leaving the home at 17. Dr. Friedrich, on the other hand, found the leaving of the home by Leah to be appropriate under the circumstances that existed, and this was following counseling between the Dulaneys and their oldest daughter. There is also evidence that Leah and her parents have a very healthy relationship at the present time.

The Court has concluded that the initial reports of J.J. and H.J. to the social worker Laura Pettey and the reports of Mr. and Mrs. Christianson to Laura Pettey do present an accurate report by the children, and that this report is to believed as to what was going on in the Johnson home in the months preceding the children being placed with the Christiansons. Obviously, no other party in this case had a chance to poison the children's minds at that time. Dr. Philip would ask the Court to believe that the children had been poisoned against their father, but he is not clear as to who is doing what. In addition, Dr. Philip would have us discount H.J.'s statements to the therapist and the guardian that she does not want to live with her father and that her father is mean. Dr. Philip would have the Court believe that subconsciously H.J. wants to be with her father.

I grant that Jay Johnson had a difficulty with visitation with his daughter H.J. here in Minnesota. The Department of Human Services required supervised visits, and this Court finds that the Department, in a lot of respects, bent over backwards to accommodate Jay Johnson's visitation rights. In some respects the Court finds that H.J. has been manipulative and in control of the entire proceedings. H.J. has on many occasions refused visitation with her father, and in particular during the course of the proceedings. The Court does not find that the Dulaneys or any other party has sabotaged the visitation rights of Jay Johnson. However, it is clear that H.J. has demonstrated that she wants to remain in the Dulaney's home, and considers Diane Dulaney to be mom and Mark Dulaney to be dad.

The difficulty that I have with Mr. Johnson's position is that the focus should not be on what the Department of Human Services did or did not do in regards to Jay Johnson's Seventh Day Adventist beliefs, but rather the focus of this case ought to be on Mr. Johnson himself. There were a number of times in Hawaii, either during a mental illness episode of Lucy Johnson or otherwise that J.J. and H.J. were placed with other people for periods of time. When the family ultimately reached Dodge County, Minnesota, the children were placed with the Christiansons. Jay Johnson signed the voluntary placement agreement for the children with Dodge County Department of Human Services, and shortly thereafter Jay Johnson left the state for Texas. Jay Johnson, from October of 1989 to the date of the death of Lucy Johnson and J.J., was primarily out of the State of Minnesota. Mr. Johnson has advanced in his own mind a lot of valid reasons for his absence from the State of Minnesota and the absence from J.J.'s and H.J.'s lives. Mr. Johnson also had an unsuccessful counseling with Glen Izawa and the violence classes of Harriet Nathan. It is not enough

to say we had a religious difference. Mr. Johnson was unwilling and unable to accept his role in the neglect that brought the children under the jurisdiction of the Minnesota Court.

Reverend Rocky Roberts, Marybeth Mosier, and Linda Christianson indicate that sometime shortly before the trial on the visit by Reverend Roberts shortly before his testimony in Court that Mr. Johnson had been willing to accept responsibility and he had made changes. Unfortunately, even if the Court were to totally find credence in Mr. Johnson's change at the present time, whatever change occurred was only after two years and four months after the children were removed from the Christianson home. Two years and four months is a terribly long time in the life of H.J. H.J. needs the security and stability of a permanent placement, and the Court is ultimately persuaded that the best placement" is in the Dulaney home.

It is obvious to the Court that the Dulaneys will provide access to the Teberg side of the family. The paternal grandparents, Robert Johnson and Jo Johnson, were present and testified and requested visitation with H.J. Interestingly, Jo Johnson the step-grandmother and H.J. had developed a rather good rapport. Robert and Jo Johnson are not Seventh Day Adventist. Apparently, some of the meals provided by Jo Johnson and/or Robert Johnson during visitations would not satisfy Jay Johnson's religious and dietary beliefs. Mr. Johnson, under cross-examination, indicated that if he were awarded custody that this would have to change also. The Court is convinced that Robert and Jo Johnson should be awarded visitation with H.J., and in fact I would encourage H.J. to go to Hawaii to be with her paternal grandparents at some time in the future.

Under the present situation, Jay Johnson's visitation may have to be limited and restricted. However, in the future,

following this proceeding, H.J. and Jay Johnson may resolve some of the problems in their relationship, and the Court would encourage a relationship of H.J. with her father in the future.

Following the submission of proposed findings by the parties, Mr. Downing brought a motion as it related to Dodge County Attorney's proposed findings and memorandum, and a hearing was held subsequent to June 2, 1992. The Court is denying Mr. Downing's motion in its entirety at the present time, but the record should reflect that Mr. Koch's proposed arguments do not necessarily reflect the position of the Department of Human Services in Dodge County. I am not going to take judicial knowledge of problems that may have existed between the County Attorney's office and the Department of Human Services on other issues. The affidavit of Sheila Skeels in support of Downing's motion seems to indicate the position of the Department in relationship to this case. The Court does not have to render an ultimate decision as to the appropriateness of the County Attorney's position in relationship to the Department of Human Services, but the record should reflect that the difference existed. As of June, the three social workers who have testified in this case are no longer with the Dodge County Department of Human Services, and this Court would have no way of knowing if the Department's position had changed following Ms. Skeels leaving the Dodge County Department of Human Services.

In conclusion, I have attempted to outline my thoughts on the decision making process in this case. I conclude that Mr. Johnson is not a fit parent to raise his remaining daughter H.J. at this time, and conclude that in the best interest of H.J. that her custody be awarded to the Dulaneys. H.J.'s fears of her father are real, and H.J. has not been poisoned to be against her father under the circumstances of this case. Jay Johnson has minimized his role

in the removal of the children and the reasons therefor, and attempts to cast blame on everyone else in this case. This has been a long, expensive, and extraordinary custody case; and it is now time for H.J. to have the permanency in her custody that a young child that is approaching ten years old deserves. I have reviewed a lot of the photos, the scrapbooks, and the videotape on the life H.J. and her sister J.J. The best place for H.J. is in her present placement with the Dulaneys, receiving whatever therapy that is needed. In this Court's opinion, H.J. will prosper in the home of Dulaneys.

Agerter, J.

STATE OF MINNESOTA
COUNTY OF DODGE

District Court - Family Division
THIRD JUDICIAL DISTRICT

Court File No. F3-91-371

In Re the Custody of:

H.J.,

a Minor,

Mark Paul Dulaney and
Diane LaVonne Dulaney,

Petitioners,

vs.

Jay Johnson,

Respondent.

NOTICE OF MOTION AND MOTION FOR AMENDED FINDINGS, OR IN THE ALTERNATIVE, A NEW TRIAL

TO: Mark Paul Dulaney and Diane LaVonne Dulaney, the above-named Petitioners, and their attorney, Lawrence Downing; Gail Baker, Guardian Ad Litem, and H.J., a Minor, and their attorney Kimball Orwoll; and Dodge County Social Services, and its attorney, Kevin Koch.

PLEASE TAKE NOTICE that on the 24th day of

September, 1992 at 1:30 P.M., or as soon thereafter as counsel can be heard, before the Honorable Lawrence Agerter, Judge of the above-named Court, at the Dodge County Courthouse, Mantorville, Minnesota, Respondent will move the Court for an Order Amending the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment filed August 28, 1992, or in the alternative, a new trial, in that the trial court erred by:

1. Failing to dismiss the CHIPS Petition before trial based upon the failure of Dodge County to comply with applicable statutes and regulations.

2. Permitting the custody petition of the foster parents to be heard jointly with the CHIPS proceeding.

3. Ordering a custody study to be performed on the parties, yet which excluded Respondent, and was ultimately precluded from evidence, preventing any recommendation from being made by an independent custody evaluator.

4. Failing to require Petitioners to obtain new counsel by reason of Mr. Downing's conflict of interest in representing the Dulaneys as foster parents, yet being compensated by H.J.'s grandfather, Jack Teberg.

5. Appointing Gail Baker as Guardian Ad Litem in the custody case, despite her obvious partiality previously reflected in the CHIPS proceeding and an adversarial relationship reflected in her role in "ambulance chasing" in the personal injury/wrongful death matter.

6. Failing to refer the entire proceedings prior to trial to Maui County, the jurisdiction of Hopefull's sole surviving parent.

7. Denying the intervention request by Hopefull's paternal grandparents seeking custody of Hopefull.

8. Denying Hopefull's pretrial visit to Hawaii

permitting an updated evaluation by Hawaiian Social Services.

9. Failing to grant Respondent's Motion to limit testimony to the CHIPS proceeding and preclude evidence relating to custody.

10. Permitting heresay testimony into evidence by Respondent's former wife, his deceased daughter, Joyfull, and his surviving daughter, Hopefull, without advance notice of an intent to present hearsay evidence by such witnesses.

11. Erring in other ways to be addressed at the Motion hearing.

Respondent will move the Court for an Order amending the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment as follows:

1. Vacating and amending the entire Findings of Fact and Conclusions of Law to read:

FINDINGS OF FACT

I.

Respondent Jay Johnson was married to Lucy Johnson on December 21, 1976, and fathered two children, Joyfull, born May 28, 1979 and Hopefull, born September 7, 1982.

II.

The Johnson family lived in the State of Hawaii until May of 1988, when they moved at the insistence of Lucy Johnson to British Columbia and eventually to Minnesota.

III.

Lucy Johnson had continuous problems with schizophrenia and related mental illness, which caused difficulties in the marriage, and often a stressful environment for their children.

IV.

Lucy Johnson had three commitments to mental institutions

prior to her marriage to Jay, and two commitments while living with Jay, once after the birth of Joy in July 1979, and once in July, 1986. Lucy was also committed by her father in late July of 1986 in Los Angeles, California for a period of three months. Lucy was committed to St. Peter's Hospital in January of 1990, and was still affected by mental illness at the time of her death by a car accident on July 6, 1991.

V.

After one year of residence in Dodge Center, Jay and Lucy Johnson, after experiencing continual difficulties living together, placed the children temporarily with the Christenson family while they made a final effort to reconcile their marriage. The Christenson family was selected by the Johnsons because of their friendship and common backgrounds as Seventh Day Adventists.

VI.

After being unable to reconcile the marriage through counseling in Rochester with Dr. Kvernon, Respondent traveled to the State of Texas to discuss the marriage problems with friends of Lucy, and to assist them with certain projects in the State of Texas. After three months time, Respondent returned to the State of Minnesota.

VII.

Within two days after Respondent's initial departure from Minnesota, pursuant to a report to Dodge County Social Services, the children were removed from the Christenson home and placed in the foster care of Petitioners, Diane and Mark Dulaney.

VIII.

Allegations of domestic child abuse were made to Dodge County Social Services, including reports by the children. Thereafter various portions of the allegations were confirmed in part by statements of Lucy Johnson, in her admission to the CHIPS

proceeding filed in November, 1989.

IX.

Respondent was eventually served with the CHIPS Petition, to which he admitted to an allegation that he had improperly disciplined the children.

X.

Upon Respondent's return from Texas to the State of Minnesota, and being advised that if he desired to receive the custody of his children, it would be necessary for him to maintain a home suitable for the children to return to, Respondent returned to his home State of Hawaii, where he had lived since April, 1972.

XI.

Respondent was required by Dodge County Social Services to engage in family counseling, abuse counseling and other activities as a condition for the return of his children.

XII.

Dodge County Social Services initially arranged for counseling with Mr. Glenn Izawa, and with abuse counselor Ms. Harriet Nathan. When Respondent did not develop rapport or make progress with the above counselors, in November of 1990 Hawaiian Child Protection Services (CPS) recommended counselor, Rev. Richard Lazor.

XIII.

Respondent entered into a counseling relationship with Rev. Lazor promptly thereafter, who referred him to another counselor due to objections to Rev. Lazor by Dodge County due to his prior favorable report on Mr. Johnson. Respondent was then referred to Reverend Harold Roberts in December, 1990 and continued in that counseling relationship through the date of trial, including weekly sessions until June, 1991, and thereafter during sessions in Minnesota in July, 1991, March, 1992, and through

various telephone and written correspondence between Respondent and Reverend Roberts.

XIV.

Reverend Roberts initially had concerns about Respondent and his unwillingness to accept responsibility for his past conduct leading to the CHIPS proceedings, and with Respondent's defensive attitude. However, after establishing a continuing relationship with Respondent, Reverend Roberts concluded that Jay Johnson had made substantial progress in counseling and had accepted responsibility for his actions.

XV.

Prior to February, 1991, Respondent had visited Minnesota on three separate occasions, in February 1990 for one month; in April, 1990 for nine days; and for nine days in October, 1990. Mr. Johnson had weekly contact with both of the children through letters and telephone calls. Respondent earned only modest income. Respondent also made financial arrangements to fly the children and Mrs. Dulaney to the island of Molokai on February 6, 1991.

XVI.

Respondent arranged this trip both because he desired to see his daughters, and to have Diane Dulaney personally meet with him, his family, friends and church community on the island.

XVII.

Upon arrival at the island of Molokai, both children initially appeared withdrawn and reserved. Tom and Cathy Larson, who had home-schooled the children for a period of two months, and who had taken care of them during July of 1986 when Lucy was suffering from her mental illness, initially observed the children to be very different from when they had last seen them on the island in the spring of 1988.

XVIII.

However, after the first day, the girls were observed to blossom in their relationship with their father. Both children were observed interacting freely and naturally with their father, their friends and other acquaintances on the island.

XIX.

During this visit, Petitioner Diane Dulaney confided to several individuals on various occasions that "things were not the way she had been told about Jay", and observed his overall environment to be very different than what she had expected.

XX.

Halfway through her visit, Petitioner had several conversations with Cathy Larson and also with the Morgan family, and stated to them her firm "conviction" that the girls should permanently remain on the island with Respondent, and not be required to return to Minnesota.

XXI.

Joyfull and Hopefull Johnson both stated to Diane Dulaney that they wanted to stay with their father on Molokai, and made plans for their expected stay with their father.

XXII.

Petitioner Diane Dulaney also confided in Cathy Larson about her struggle with the emotional attachment she had developed with the children, and expressed her concern that it would be "a real struggle to give up the children, particularly because of the difficulty she was presently having with her daughter Leah." Diane Dulaney also asked Cathy Larson if she believed that Lucy's father, Jack Teberg, "might be willing financially to help her obtain custody if she could not give up the children."

XXIII.

During her stay on Molokai, Ms. Dulaney also discussed her recommendation to have the children remain in Respondent's care with Hawaiian social Services worker Wendy Beckett.

XXIV.

Ms. Beckett contacted Dodge County Social Services, requesting authority to keep the children on the island, which request was denied. However, Dodge County Social Services discussed their willingness to expedite the paper work to facilitate the return of the children to Respondent's custody in Hawaii.

XXV.

Thereafter, the children were advised by Diane Dulaney that they could not remain with their father on the island, which caused them great disappointment. The night prior to their departure, both children cried themselves to sleep, and were upset that they could not remain and live with their father.

XXVI.

Three months later, on July 6, 1991, while Lucy Johnson was arguing with her daughter Joyfull over the selection of a radio station to listen to in the automobile in which they were riding as passengers, Lucy's then boyfriend, the driver of the vehicle, drove head-on into a semi-trailer, killing both Lucy and Joyfull Johnson.

XXVII.

Hopefull Johnson received a broken leg and other injuries, with concern continuing over the "growth plate" in Hopefull's right leg, which may require medical attention in the future.

XXVIII.

Upon hearing of the death of his wife and daughter Joyfull, Respondent was emotionally distraught and immediately returned to Minnesota with the expectation of returning to Hawaii with Hopefull in his custody.

XXIX.

Hopefull told Respondent while at the funeral home at the review of her sister and mother, that she desired to return to Hawaii.

XXX.

When Hopefull was in the hospital, the Larsons contacted her from Hawaii by telephone, and were told by Hopefull that she desired to return to Hawaii with her father.

XXXI.

While visiting at the hospital, Respondent was asked by Petitioner Mark Dulaney how long he expected to be in Minnesota, to which Respondent replied "until I can return to Hawaii with Hopefull". Mr. Dulaney responded, "I don't want to hear that. I don't know that I am ever going to be over the loss of Joy. Don't even tell me that you want to take Hope with you."

XXXII.

Mark Dulaney also told Respondent on one occasion, "You're not Hopefull's father." On a subsequent occasion, Hopefull told Respondent "you are not my father."

XXXIII.

Thereafter, a review hearing was held by this Court on August 8, 1991, and the Court noted in its Memorandum and now finds that Respondent has in essence followed the Court Orders in this case. The Court also found that "if the child is to be returned to her father, the bonding between the Dulaneys and Hopefull Johnson must be terminated. It may be pointed out to Dulaneys that as foster parents they took the children on a temporary basis with the understanding they would ultimately be returned to their natural parents. In this case almost the entire effort has been made to restore the girls to the natural mother and, in fact, a target date was set of April 13, 1991, to restore the children to the natural

mother. It appears to this Court that no consideration over the two-year period has ever been given to reunifying the children to the natural father."

XXXIV.

After numerous visits and attempted visits, extended periods occurred without any visitation by Respondent with Hopefull, because she refused to go on visits with her father, whether Court ordered or not.

XXXV.

On certain occasions, visitation appeared to be looked forward to and planned out by Hopefull, only to change after Hopefull talked to the Dulaneys, and then advise that she was not interested in seeing her father.

XXXVI.

Numerous other instances of attempted visitation also failed to occur, through the failure of the Department of Social Services or the Dulaneys to prevent interference or manipulation of the visitation process by the Dulaneys or Hopefull herself.

XXXVII.

Respondent's visitation has continued to be limited on a supervised basis, which has further created frustration and conflict in the father/child relationship. As a nine-year-old, Hopefull desires to please the Dulaney's, but she has a deep underlying motivation to renew her relationship with her father.

XXXVIII.

By the fall of 1991, after Hopefull Johnson had been residing with her foster parents for over two years, she remained burdened by significant emotional and psychological needs resulting from the death of her mother and sister, which needs were being addressed only in part by Diane and Mark Dulaney.

XXXIX.

The Dulaneys ultimately failed to protect Hopefull from becoming overly-attached to them emotionally, and failed to preserve their primary role as foster parents, instead becoming dependent upon their relationship with Hopefull to meet their own emotional and psychological needs.

XL.

Petitioner Mark Dulaney has unresolved emotional conflict dating back to his own youth, admitting to feelings of rejection by his father as a child, and to now having those same feelings of rejection toward his eldest daughter Leah.

XLI.

Diane Dulaney also admitted to feeling frustration with the emotional struggles involving her daughter Leah, and her compensating for that sense of failure through her attachment to Hopefull Johnson.

XLII.

Upon being notified on March 3, 1991 by Petitioner of her concerns about "the children becoming too dependent upon her", Social Services failed to provide assistance to Hopefull Johnson and the Dulaneys to avoid any further unhealthy attachment or bonding to her foster parents.

XLIII.

A failure to now immediately return Hopefull to Jay Johnson's custody will only aggravate continuing conflicts in the father/child relationship, would be detrimental to Hopefull's emotional well-being, and contrary to her best interests.

XLIV.

Reasonable efforts have not been made to attempt to return Hopefull to the custody of her father, nor to avoid the initial need for placement of both children in foster care. Continued

placement of Hopefull in foster care; 5,000 miles away from her father's home on the island of Molokai in Hawaii, continues to frustrate the necessary goal of reuniting parent and child, and will further undermine and threaten the existing parent/child relationship.

XLV.

The Department of Social Services also failed to comply with Minn. Stat. 257.071, subd. 2 and Department of Human Services' Regulation Part 9560.0670, subpart 3 requiring that an administrative review hearing be held within 180 days of the initial placement of the child into foster care, and every six months thereafter.

XLVI.

As a consequence of the Department's failure to comply with relevant statutes and regulations, Respondent was denied due process, including the involvement of a neutral third party not responsible for the case management of or the delivery of services to either the child or the parents, to ensure meeting the primary goal of reunifying the foster-placed child with her natural parents at the earliest date possible.

XLVII.

The Department of Social Services also failed to provide protection for the religious faith and practice of Respondent in violation of Minn. Stat. 257.071, subd. 1(a), Minn. Stat. 260.181, subd. 3, and Department of Human Services' Regulation part 9560.0630, which alienated Respondent from his daughter, and helped deprive him of the opportunity to begin rebuilding his relationship with her.

XLVIII.

Respondent has completed all requirements which could reasonably be expected of him by Dodge County Social Services.

Although not met to their complete satisfaction, the Court finds that given Respondent's age, education, background and personality, Respondent has made noticeable progress, adequate to support a determination that he is a fit parent able to resume full custody of his child Hopefull.

XLIX.

Dr. Philip, and Reverend Roberts both concluded that Respondent has made adequate progress in counseling, and is amenable to further therapy if deemed appropriate in the custody transition of Hopefull.

L.

The Court's disposition serves the best interest of Hopefull, whereas, alternative dispositions are not appropriate. It is clearly not in the best interests of the child to be surrounded by litigation throughout her childhood. Petitioners both testified that the strained relationship which they felt existed between Hopefull and her father needed resolution "at the earliest available opportunity." Any further delay in reuniting father and child is not justified.

LI.

Transfer of jurisdiction to Maui county is not necessary, as this Court has no jurisdiction over the CHIPS proceeding, due to failure by the Dodge County Social Services Department to conduct its activities pursuant to applicable statutes and regulations. Granting custody to Petitioners only guarantees uncertainty for Hopefull and continued stress, frustration and difficulty for all parties concerned. The sooner Hopefull is reunited with her father, the sooner her life may return to normal.

LII.

Under Minn. Stat. 260.181, subd. 3, Hopefull is considered an individual with minority ethnic heritage, as a Seventh Day Adventist. It is important now for her healing and growth to be

exposed to the same religious values which she grew up with in her father's home, prior to the traumatic death of Lucy and Joyfull.

LIII.

Reasonable efforts consistent with Minn. Stat. 260.012 were not made to prevent or eliminate the need for Hopefull's removal from her home and to reunite her with her father after the initial removal.

LIV.

With respect to the statutory factors affecting the child's best interests, the twelve factors under Minn. Stat. 518.17, subd. 1, are found by the Court as follows:

(1) The wishes of the child's parent or parents as to custody: In this case the natural parent of the child, Jay Johnson, strongly desires to be reunited with his daughter. Mr. Johnson has resided in Minnesota with minimal employment or other source of support, from July 7, 1991 through the date of trial, for the sole purpose of seeking reunification with his daughter.

(2) Reasonable preference of the child if the Court deems the child is of suitable age to express a preference: In this case both psychologists testified and the Court finds that Hopefull is not of suitable age to express a reasonable preference, and therefore this factor is not relevant.

(3) The Child's primary caretaker: During the time period of their marriage, Mr. Johnson served as the children's primary caretaker, or shared in providing these functions with his wife, Lucy. During substantial periods of time, he was the only caretaker, when Lucy was unable to take care of the children because of her mental illness. Since the children were placed in foster care, the Dulaneys have been primary caretakers of Hopefull. However, at the time of the overall separation of the family unit, Jay Johnson was a primary caretaker of Hopefull.

(4) The intimacy of the relationship between each parent and the child: Prior to placement of the children in foster care, Hopefull had a very close relationship with her father. After placement she displayed continued affection and interest in Jay during various periods of visitation prior to the death of her mother and sister. Thereafter, because of the traumatic loss of her mother and the fear of loss of her foster parents, Hopefull developed a clinging, dependent relationship to the Dulaneys, reflecting an unhealthy bond between foster child and foster parents. Although this relationship appears close on the surface, it is not as deep and enduring as Hopefull's relationship with her natural father, Jay Johnson.

(5) The interaction and the interrelationship of the child with the parent or parents, siblings and any other person who may significantly affect the child's best interests: Jay Johnson has interacted very well with his daughter, including periods prior to the placement of the children in foster care, exercise of visitation thereafter, visitation during the children's trip to Hawaii, and visitation on various occasions after the accident of July 6, 1991. Jay Johnson's stepmother, Jo Johnson, also has developed a close relationship with Hopefull, particularly during her stay in Minnesota for a 10-week period during the course of trial. Hopefull also has relationships with her uncles, relatives and numerous friends on the Island of Molokai, which she will enjoy upon her return.

The Dulaneys have developed a close relationship with Hopefull during the time period in which they have served as foster parents, as have the Dulaneys' own biological children. However, these relationships, arising during foster care, are not as stable and long-lasting as the relationships with Hopefull's biological family. All the surviving members of her family are

located on the Island of Molokai, with the exception of her aunt in Texas and divorced maternal grandparents, living in the State of California. A serious negative impact upon Hopefull will occur in future years if she is not now returned to her natural family, to grow and develop a natural sense of identity and self-esteem.

(6) The child's adjustment to home, school and community: Hopefull's adjustment to her home and community on the island of Molokai was strong prior to the Johnson family departing from the islands in the search for Lucy's mental health and stability. Hopefull has since become outwardly adjusted to her home, community and school while living with her foster parents. However, Hopefull has expressed a sense of boredom with her life. She has inquired about attending Christian School. Hopefull has maintained ongoing relationships with many of her friends on the island of Molokai, and expressed a strong desire to remain there after her nine-day visit in February, 1991. Although it will require adjustment for Hopefull to return to Molokai, it is inevitable for that adjustment to occur. The longer the delay in Hopefull returning to Hawaii, the more difficult the adjustment will be.

(7) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity: Prior to departing from the island of Molokai and coming to Minnesota, Respondent lived with Hopefull for the first six years of her life. Although portions of the last year that Hopefull lived with Jay and Lucy Johnson in Minnesota were stressful, because of Lucy's mental instability and its impact upon the family unit, Hopefull's formative years in Hawaii provided a stable and satisfactory environment for Hopefull's youth.

Since that time, Hopefull has found some stability in the home of the Dulaneys, but their relationship together is mutually dependent and has served as a crutch for Hopefull, not the

foundation of a healthy relationship. The Dulaneys' relationship with their own biological daughter Leah has itself reflected instability in the Dulaney household during the past year. The Dulaney household will never provide a stable environment for Hopefull as long as her relationship with her father has not been restored.

(8) The permanence, as a family unit, of the existing or proposed custodial home: Hopefull Johnson lived for seven years with her biological father and mother. She should now be returned to the permanence of that setting with her father in Hawaii. Her residence with foster parents Dulaneys, intended to be only temporary, can never achieve the same permanence as her relationship with her biological family.

(9) The mental and physical health of all individuals involved: Both Mr. Johnson and the Dulaneys have adequate mental and physical health.

(10) The capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture, religion and creed, if any: Jay Johnson has demonstrated a strong capacity and disposition to love and demonstrate affection and guidance toward his daughter Hopefull. He left his home and job in Hawaii on several occasions to visit his children in Minnesota. He brought them back to Hawaii in February, 1991, and has stayed ten months between the date of the accident and the date of trial, for the sole purpose of obtaining custody of Hopefull and returning with her to Hawaii.

Mr. Johnson also has strong religious beliefs arising from his faith as a Seventh Day Adventist, and has raised Hopefull according to the doctrines of his faith until her placement in foster care. Mr. Johnson has demonstrated continuing concern over the

lack of respect shown for his faith, including the importance of a vegetarian diet, Christian schooling, honoring of the Sabbath, and other significant doctrines of his faith.

Although the Dulaneys are members of the Christian faith as well, the doctrines and expression of their Charismatic faith are significantly diffe£ent from the traditions of the Seventh Day Adventists. It has been confusing for Hopefull emotionally to deal with the death of her mother and sister, because of the difference between the teaching she received during the first seven years of her life and the teaching since received from the Dulaneys. Hopefull has expressed negative, hopeless and suicidal thoughts, reflecting a lack of successful adaptation to her present environment, and lack of spiritual understanding from her current religious training. Based upon the importance of Hopefull's early years in the Johnson family tradition, she can best be raised in the culture, religion and creed espoused by her father.

(11) The child's cultural background: Hopefull's cultural background is based upon the island of Molokai. The Hawaiian Islands provided her with the culture and upbringing for the first six and most significant years of her life. Hopefull has her own niche to return to on the island of Molokai, including young friends and church community, much of which centers on the Seventh Day Adventists' tradition and expression of faith.

Hopefull also maintains an attachment to the lifestyle of the islands themselves, as reflected by her desire to remain on Molokai in February of 1991, and her request to return there as expressed to the Court at the end of December, 1991. Hopefull's request to stay there for a period of "a month or two, or maybe longer" reflects a strong attachment to that culture which Hopefull is unlikely to ever lose. While Hopefull does not desire to disappoint or displease the Dulaneys, she is subject to conflicting

feelings and pressures, causing pain and confusion, because she cannot please both her father and the Dulaneys.

(12) The effect on the child of the actions of an abuser, if related to domestic abuse, as defined in Section 518.B01, that has occurred between the parents: Hopefull and her sister complained of arguing between her parents leading to voluntary placement of the children with the Christenson family prior to the children being removed to foster care. The record reflects that the majority, if not all, domestic abuse incidents in the Johnson marriage occurred by Lucy against Jay Johnson, as a consequence of her severe mental illness.

Any conduct considered abusive by Jay Johnson was the result of his struggle to respond to Lucy's psychotic behavior, which can no longer be considered a relevant factor since Lucy's death. Hopefull has been encouraged by others to remember various negative conduct by both parents, which Hopefull on occasion blames her father for. It is unlikely that Hopefull would display such negative attitudes without receiving encouragement from others. Such incidents are properly considered as isolated, related to Lucy's uncontrolled behavioral outbursts, and are not likely to be repeated in the future of Hopefull's relationship with her father.

LV.

The Dulaneys have not proven that Respondent is an unfit parent, nor that he is incapable of providing for the care and support of his daughter Hopefull.

LVI.

Petitioners have failed to meet their burden of proof that it is in the best interest of Hopefull Johnson that her custody be awarded to them.

LVII.

Hopefull's past residence in the State of Minnesota represents a continuing series of painful memories for Hopefull, including separation of her parents; separation from her parents; the departure of her father to her home in Hawaii; her adjustment to a new male individual involved in a relationship with her mother; witnessing the tragic death of her mother; witnessing the tragic death of her sister; suffering her own injuries from the fatal car accident; and other painful and difficult memories relating to Hopefull's residence in this State.

LVIII.

Although some trauma may occur from breaking the unhealthy bond which has been established between Hopefull and her foster parents, that relationship was always intended to be only a temporary bond. A custody award to the foster parents would only unnecessarily extend, without justification, a relationship which ultimately must be severed.

LIX.

Although evidence was submitted tending to reflect an attitude of fear or anger by Hopefull toward her father, that attitude could not have been generated from the natural, loving relationship which existed between Hopefull and her father prior to their separation.

LX.

Hopefull's relationship with Respondent prior to their departure from the island of Molokai was a loving and affectionate one. The same relationship was reflected upon her return to the island of Molokai in February, 1991.

LXI.

The relationship of biological parent and child is a significant one. The development of that relationship should not

be altered or arrested any longer than necessary. Hopefull Johnson has already suffered much pain and trauma in her young life, including the mental illness of her mother, and the events of the past two years.

LXII.

It is not in the best interest of Hopefull to remain any longer in the Dulaneys' home.

LXIII.

It is in the best interest of Hopefull Johnson that she be reunited with her father; Respondent loves her, and can provide for her reasonable needs.

LXIV.

Based upon the failure of Dodge County Social Services to comply with applicable statutes and Department of Human Services' regulations, there is no further basis for jurisdiction in Minnesota or elsewhere.

LXV.

It is in Hopefull's best interest that the transfer of custody to Respondent take place effective immediately, within (48) hours from the date of this Order.

LXVI.

Respondent has had inadequate income to live in Minnesota during the pendency of this proceeding and maintain ongoing obligations in his home state of Hawaii, thereby running into debt to his father in payment of rent and utilities for his home on the island of Molokai. Respondent is in no financial condition to contribute to Dodge County, Minnesota for its costs incurred in foster placement or related expenditures.

IT IS ORDERED:

1. Custody of Hopefull Johnson shall, be transferred to Respondent within (48) hours from the date of this Order.

2. The CHIPS proceeding herein is dismissed with prejudice.

3. Guardian Ad Litem, Gail Baker, is hereby discharged.

4. The Dulaneys' Petition for an award of Hopefull's custody is denied.

5. Dodge County shall be financially responsible for the foster care placement and related services provided on behalf of Joyfull and Hopefull Johnson.

6. The Memorandum attached hereto is hereby incorporated as the Court's explanation of its decision.

2. For such other and further relief as the Court may deem just, fair and equitable in the premises.

Said Motion is based upon the attached Affidavit, the arguments of counsel, together with all pleadings, records and files herein.

Dated: September 9, 1992.

/ s /
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7101 Northland Circle, Suite 102
Minneapolis, MN 55428-1598
(612) 537-5585
ATTORNEY FOR RESPONDENT

STATE OF MINNESOTA
COUNTY OF DODGE

District Court - Family Division
THIRD JUDICIAL DISTRICT

In Re the Custody of:

File F3-91-371

H.J.,

a minor,

Mark Paul Dulaney and
Diane LaVonne Dulaney,

Petitioners,

vs.

Jay Johnson,

Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR AMENDED FINDINGS OR, IN THE ALTERNATIVE, A NEW TRIAL

* *

The above-entitled matter came on before the undersigned Judge of District Court on October 2, 1992. Respondent filed a Motion for Amended Findings or, in the Alternative, a New Trial. In addition thereto, Respondent filed an Amended Notice of Motion and Supplemental Motion. All motions were argued before this Court on October 2, 1992.

Present at this hearing was Respondent's counsel, Brian Peterson, of Minneapolis, Minnesota; Diane LaVonne Dulaney, one of the Petitioners herein, and her counsel, Lawrence Downing, of Rochester, Minnesota; Gail Baker, the Guardian ad litem, was present and represented by her counsel, Kimball Orwoll, of

Rochester, Minnesota; and Gary B. ReMine, Assistant Dodge County Attorney, represented the Dodge County Department of Human Services.

On October 2, 1992, on the record, the Court made its decision denying the Motion for Amended Findings and/or in the Alternative a New Trial. The Court heard additional arguments on the Amended Notice of Motion and Supplemental Motion, and indicated that it would enter a written order concerning the matters raised in the Amended Supplemental Motion.

Based upon the entire record herein the Court hereby enters the following Order:

1. Respondent's motion to remove the restriction that Respondent's visitation with H.J. be supervised may be and hereby is denied.

2. Holly Benda of the Department of Human Services Dodge County may be and hereby is directed to continue to facilitate visitation between the Respondent and his minor child H.J., with the ultimate goal of reaching the point of unsupervised visitations.

3. Respondent's motion to require the Department of Human Services Dodge County or Steele County to provide Respondent with a present plan for reunification of Respondent with H.J. may be and hereby is denied.

4. Respondent's motion requiring Petitioners to provide Respondent with their new address and telephone number at their new home in Steele County along with the name, address and telephone of H.J.'s new school is moot, since Diane Dulaney, on the record, provided that information to counsel for the Respondent.

5. Respondent's motion to visit H.J. at her new home upon reasonable advance notice is left to Holly Benda to determine

if this is appropriate.

6. Respondent's motion that H.J. be tested for allergies to dog and cat dander, and to gluten and lactose intolerance at the earliest opportunity may be and hereby is denied, since the child is receiving appropriate treatment at the Mayo Clinic.

7. Respondent's motion establishing out-of-state visitation with H.J. for Respondent's parents in the State of Hawaii for two weeks during Christmas vacation, nine days during Easter, and ten week during the summer, residing with Respondent's parents on the island of Molokai, may be and hereby is denied.

8. Holly Benda may be and hereby is directed to provide the Court with an appropriate schedule for out-of-state visitation for H.J. with her paternal grandparents in the State of Hawaii or Minnesota. Ms. Benda may provide the Court with her recommendations, and if parties cannot agree, the matter may be reheard by this Court.

9. That "Appendix A" may be and hereby is attached to this Order and incorporated by reference including a notification regarding deprivation of parental rights law under Minnesota Statute Section 518.177.

10. Respondent may be and hereby is directed to keep the Court fully informed as to the status of the pending wrongful death case and monies that the Respondent may recover as a result of his suit. Counsel for all parties in this case shall be provided this information by the Court.

11. The attached Memorandum may be and hereby is incorporated by reference herein.

Dated this 3rd day of November, 1992.

BY THE COURT:

/ s /
Lawrence E. Agerter,
District Court Judge

MEMORANDUM

The Court heard the arguments, and, obviously, this matter now may proceed to the appellate courts for appropriate review. The Court had denied Respondent's Motion for Amended Findings, or, in the Alternative a New Trial. All the issues raised by the Respondent were covered in the Court's Findings and Memorandum.

Respondent's Supplemental Motion was taken under advisement by the Court, and the Court now issues its decision therein. The Court is fully aware that the child H.J. has visited her father (the Respondent herein) on at least two occasions following the conclusion of the trial and the Court's entry of its order. These visits were facilitated by Holly Benda of the Department of Human Services, who was not involved during most of the process herein and did not testify in this case. The time has now come, following this lengthy proceeding and the acrimony that has developed between the parties, to see if there is some practical way to reconcile the differences of the child and her father so as to allow Mr. Johnson appropriate visitation. If anyone can do this, the Court is of the opinion that Holly Benda may be able to do so. The ultimate goal should be to arrive at unsupervised visitation and an appropriate visitation between the father and the daughter. It is time for Mr. Johnson to accept the reality of his situation, and to attempt in the interest of H.J. to accept his responsibility for the wall between himself and his daughter.

The Court is also asking Holly Benda of the Department of Human Services to attempt to arrive at an appropriate visitation with the paternal grandparents in Hawaii, and this Court obviously is going to encourage that. The Court is denying as being unreasonable the amount of time that the paternal grandparents want the child in Hawaii, without receiving an appropriate

recommendation from Ms. Benda. The Court is very hopeful that H.J., who has already expressed an interest to return to Hawaii, to chose to make that journey for visitation and stay with her paternal grandparents. The child's relationship with her step-grandmother Jo Johnson developed rather well during the course of the trial, even though the step-grandmother's care of the child would not be approved by Jay Johnson. Obviously, H.J. will enjoy a very healthy relationship with the maternal grandparents, and there is no question that the Dulaneys and the maternal grandparents will cooperate fully in that area. The time requested by the paternal grandparents certainly would conflict with this custodial arrangement and the visitation of H.J. with her maternal grandparents.

This Court has attached "Appendix A" with its appropriate notification of the deprivation of parental rights, and Mr. Johnson should be put on notice. In addition thereto, the Court is requiring Mr. Johnson to fully account to the Court and counsel as to the status of the wrongful death case now pending wherein Mr. Johnson and H.J. are the beneficiaries. Number one, there is an outstanding obligation for Mr. Johnson to pay support; and in addition thereto, the attorney's fees borne by the County of Dodge and the Dulaneys have, in all likelihood, exceeded everyone's expectations in this case.

Mr. Johnson may choose to appeal this case and rightfully so, but somewhere Mr. Johnson has to realize that he may have to pay financially towards attorney's fees. Ultimately Mr. Johnson has the obligation of support for H.J.

In conclusion, this Court has struggled throughout this case with an appropriate decision that I find in H.J.'s best interests and H.J.'s best interests are paramount over every other consideration in this case. I am confident that the Dulaneys will do their part in

encouraging H.J. to visit her father, and as long as Jay Johnson is appropriate, I am sure that Diane and Mark Dulaney would allow Mr. Johnson to visit H.J. in their home, ultimately. The Court obviously directs the Department of Human Services (Holly Benda) to discontinue any consequences for H.J.'s refusal to go on visitation with her father. The Court is willing to talk to the child about the importance of continuing her relationship with her father. Mr. Johnson is an intelligent individual, and this Court has not asked Mr. Johnson to alter his religious views, which are strongly held, but the Court is asking him to bend his rigidity in his personality as it relates to his daughter H.J. There comes a time when one simply has to accept reality and do what is right, and this is what the Court is asking of Mr. Johnson.

Agerter, J.

NOTICE: MEDIA AND COUNSEL ARE PROHIBITED FROM MAKING THIS OPINION OR ORDER PUBLIC PRIOR TO 12:01 A.M. ON THE FILE DATE

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1992).

STATE OF MINNESOTA
IN COURT OF APPEALS
C4-92-2288
C1-93-508
C3-93-509

Dodge County
District Court File Nos. F391371, P891298

Holtan, Judge*

In Re the Custody of H.J., a Minor.

AND

In the Matter of the Appointment of a Trustee for the next-of-kin of L.J. and J.J., Decedents

AND

In Re the Guardianship of: H.J., Ward.

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Filed August 3, 1993
Office of Appellate Courts

Considered and decided by Parker, Presiding Judge, Norton, Judge, and Holtan, Judge.

UNPUBLISHED OPINION

HOLTAN, Judge

Appellant, father of H.J., seeks review of the trial court's award of permanent custody of H.J. to her foster parents, respondents M.D. and D.D. Appellant also challenges the trial court's orders removing him as trustee to pursue claims arising out of an automobile accident in which H.J. was injured and her mother and sister were killed. We affirm.

FACTS

Appellant and his wife, L.J., and their two children, J.J. and H.J., lived in Hawaii until 1988, when they settled in Minnesota. In September of 1989, the Dodge County Department of Human Services (county) became involved with the family, responding to several reports of neglect and abuse. The children reported both parents hit them, that appellant hit them with a stick, and that when they cried appellant pinned them on the floor and covered their mouths so that they could not breathe. In October 1989, the county placed the children in the home of M.D. and D.D. The county filed a child in need of protection or services (CHIPS) petition in November 1989. The children were adjudicated in need of protection or services by order on February 20, 1990. Appellant admitted to some of the allegations of the petition.

Appellant and L.J. separated in October 1989, and appellant left to stay with friends in Texas. Appellant returned to Minnesota for one month in February 1990, and then moved back

to Hawaii. The children continued in the foster care placement. In February 1991, D.D. accompanied the children on a trip to Hawaii to visit appellant. The children enjoyed the trip but reported they did not want to live with appellant.

L.J. commenced a marriage dissolution proceeding in Minnesota. Before the final decree was entered, L.J. and J.J. were killed in an automobile accident which occurred on July 6, 1991. H.J. was seriously injured in the accident. Appellant immediately returned to Minnesota and sought to regain custody of H.J. M.D. and D.D. filed a petition for permanent custody, and the trial court consolidated the CHIPS and custody proceedings.

After a lengthy trial, the trial court granted the D.'s custody petition and dismissed the CHIPS proceeding. The trial court denied appellant's request for post-trial relief. The trial court also vacated appellant's appointment as trustee in the wrongful death and personal injury actions resulting from the automobile accident, and appointed M.D. as trustee. This appeal followed.

DECISION

I.

Appellant raises several procedural issues, including the trial court's refusal to transfer jurisdiction to Hawaii, the failure to dismiss the CHIPS petition prior to trial and the consolidation of the CHIPS and custody proceedings.

Minnesota has "home state" jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA), because of H.J.'s residence here since 1989. See Minn. Stat. § 518A.03, subd. 1(a) (1992). A court which has jurisdiction may defer to the jurisdiction of another state if it is in the interests of the child. Minn. Stat. § 518A.07, subd. 3 (1992). In this case, the trial court declined to transfer jurisdiction to Hawaii because of the strained relationship between appellant and H.J. and the traumatic effect on

H.J. of immediate removal from the D.'s home. We find no abuse of discretion.

Appellant contends the trial court erred in failing to dismiss the CHIPS petition prior to trial due to the county's noncompliance with statutory provisions regarding administrative review and protection of the child's ethnic heritage. We disagree. The administrative review requirement applies to voluntary foster care placements. See Minn. Stat. § 257.071, subd. 2 (1992). In this case, H.J. was placed in foster care pursuant to an order adjudicating her in need of protection or services under Minn. Stat. § 260.191, subd. 1 (1988). The trial court is required to review all disposition orders at least every six months, see Minn. R. Juv. Cts. 62.06, subd. 1, and it appears that such review occurred in this case.

Appellant also argues the CHIPS petition should have been dismissed because H.J. was not placed in a Seventh Day Adventist home, thus violating the statutory mandate for protection of the child's ethnic heritage. We note, however, that the statute differentiates between protecting the child's race or ethnic heritage and placing the child in a similar religious background to that of the parents. See Minn. Stat. § 260.181, subd. 3 (1992). Appellant is precluded from contesting the propriety of the placement with the D. family, because he did not appeal the February 20, 1990 disposition order. See Loram Maintenance of Way, Inc. v. Consolidated Rail Corp., 354 N.W.2d 111, 113 (Minn. App. 1984) (party who fails to appeal is bound by decision).

Appellant challenges the trial court's decision to consolidate the CHIPS and custody proceedings. Where concurrent juvenile protection and custody proceedings are pending, consolidation may be appropriate, and the trial court's decision regarding consolidation is reviewed under an abuse of discretion

standard. Durkin v. Hinich, 442 N.W.2d 148, 152 (Minn. 1989). The trial court acted within its discretion in consolidating the proceedings and hearing evidence on both petitions in this case. See In re E.A.Q.D., 405 N.W.2d 262, 265 (Minn. App. 1987) (competing interests of adult litigants and the best interests of the children are served by joinder of the contested issues in one court at one time).

II.

Appellate review of a custody determination is limited to whether the trial court properly applied the law or issued findings unsupported by the evidence. Pikula v. Pikula 374 N.W.2d 705, 710 (Minn. 1985). The trial court's findings will be sustained unless clearly erroneous. Durkin, 442 N.W.2d at 151-52. The presumption that a natural parent is fit to raise his or her own child may be overturned if there are "grave and weighty" reasons to separate a child from the natural parents. Wallin v. Wallin, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971). The natural parent is entitled to custody unless that parent is unfit or it has been established that such custody would not be in the best interests of the child. Id. at 266, 187 N.W.2d at 630.

In this case, the trial court properly applied the factors under Minn. Stat. § 518.17, subd. 1 (1992) in assessing H.J.'s best interests. See Tubwon v. Weisberg, 394 N.W.2d 601, 604 (Minn. App. 1986). The trial court properly considered 10-year-old H.J.'s strong attachment to the D.s and expert testimony regarding appellant's parenting deficiencies. The trial court's ultimate conclusions that appellant is not a fit or suitable parent and that H.J.'s best interests are served by granting permanent legal and physical custody to the D.s are supported by extensive findings of fact. We defer to the trial court's determination that the witnesses called by the D.s and H.J.'s guardian ad litem were more credible

than appellant's witnesses. See General v. General, 409 N.W.2d 511, 513 (Minn. App. 1987).

Appellant does not directly address the trial court's analysis of the section 518.17 factors, but challenges the D.s' standing to seek permanent custody and focuses on the county's alleged failure to make reasonable efforts to reunify appellant and H.J. in the juvenile protection proceeding.

A person may seek custody of a child by filing a petition or a motion pursuant to section 518.156. Minn. Stat. § 257.025(e) (1992). Minn. Stat. § 518.156 provides that a child custody proceeding is commenced by a parent or "by a person other than a parent * * *." Id., subd. 1(b) (1992). In view of this broad language, the D.s have standing to seek permanent custody. See E.A.Q.D., 405 N.W.2d at 264 (nonparent with whom the child has been placed has standing to seek permanent custody).

The trial court found the county made little effort to reunite appellant with H.J. and that appellant did cooperate by going to counseling in Hawaii. The trial court also found, however, that appellant effectively sabotaged his involvement by failing to progress in counseling, and that appellant has failed to acknowledge the adverse effect of his lengthy absence from Minnesota on his relationship with H.J. These findings are supported by the record. The primary responsibility for H.J.'s estrangement from appellant rests with appellant, and appellant has not established that the failure of the reunification process should preclude the custody award.

Appellant also argues the trial court's decision to grant permanent custody to the D.s while dismissing the CHIPS petition was error, because it has resulted in a de facto termination of his parental rights. In Durkin, the supreme court affirmed the trial court's dismissal of the juvenile protection petition, noting that the

natural parent retained visitation rights and that if the chapter 260 petition were remanded for further consideration, it was possible the parent could lose all parental rights. Durkin, 442 N.W.2d at 152. Similar considerations apply here, and we find no abuse of discretion.

III.

Appellant challenges the trial court's vacation of his appointment as trustee in the wrongful death and personal injury actions resulting from the July 6, 1991 accident. The appointment of a trustee under Minn. Stat. § 573.02, ,subd. 3 to commence a wrongful death action is within the discretion of the trial court. In re Wrongful Death of Carlson, 427 N.W.2d 752, 754 (Minn. App. 1988). In this case, the trial court indicated replacement of appellant by M.D. as trustee for the wrongful death action was appropriate because of appellant's strained relationships with L.J.'s father and H.J., and because of appellant's errors in handling the matter. We find no abuse of discretion.

Similarly, the trial court's replacement of appellant with M.D. as trustee for H.J.'s personal injury action was not an abuse of discretion, in view of the estrangement between appellant and H.J. and the fact that M.D. has been awarded legal and physical custody of H.J. See Murphy v. Bergo, 400 N.W.2d 387, 389 (Minn. App. 1987) (decision to bring or maintain a lawsuit on behalf of a minor child is appropriately made by child's legal custodian).

IV.

Appellant raises several other issues that require brief discussion. Appellant argues the trial court erred in permitting hearsay testimony regarding statements made by J.J., L.J., and H.J. It appears the hearsay generally pertains to reports of abuse of the children by appellant. Appellant has not identified any alleged

improper hearsay that was not already admitted through the social services file. See In re Brown, 296 N.W.2d 430, 436 (Minn. 1980) (reports, evaluations, and summaries of medical and social workers are admissible as records of regularly conducted business activities pursuant to Minn. R. Evid. 803 (6)). If there was error in admitting the hearsay testimony, it was harmless. See Minn. R. Evid. 103(a); In re Estate of Lea, 301 Minn. 253, 259, 222 N.W.2d 92, 97 (1974) (error in the admission of evidence that is cumulative is usually deemed to be harmless).

Appellant challenges the trial court's refusal to allow him unsupervised visitation with H.J. The trial court has broad discretion to determine appropriate visitation. Rutten v. Rutten, 347 N.W.2d 47, 51 (Minn. 1984). The trial court's findings regarding H.J.'s fear of appellant and H.J.'s endangerment in appellant's care justify the requirement that visitation be supervised. See Minn. Stat. § 518.175, subd. 1 (1992).

Appellant contends the trial court abused its discretion in denying his parents' request to intervene in the custody proceeding and for scheduled visitation. Appellant lacks standing to raise these issues, because the trial court's rulings do not affect his legal rights. See In re Getsug, 290 Minn. 110, 114, 186 N.W.2d 686, 689 (1971) (to be an aggrieved party entitled to appeal, there must be a denial of some personal or property right).

Appellant challenges the trial court's order directing withdrawal of his court-appointed counsel for post-trial proceedings. Appellant is no longer entitled to appointed counsel under chapter 260 because of the dismissal of the CHIPS proceeding. See Minn. Stat. § 260.155, subd. 2 (1992). Generally, indigent parties do not have the right to court-appointed counsel in civil actions. See Hepfel v. Bashaw, 279 N.W.2d 342, 348 (Minn. 1979) (holding regarding right to counsel in paternity action does

not affect right of indigent defendants in other civil actions to appointed counsel). The trial court did not err in withdrawing the appointment of appellant's counsel. In addition, in view of the continuing litigation over visitation, the trial court did not abuse its discretion in continuing the appointment of counsel for the guardian ad litem. See Minn. Stat. § 518.165, subd. 1 (1992) (trial court has discretion to appoint a guardian ad litem in a child custody proceeding where custody or visitation of the child is an issue).

Appellant contends the trial court abused its discretion in appointing the guardian ad litem for the CHIPS proceeding as the guardian in the custody proceeding. Appellant argues a neutral guardian should have been appointed. The trial court indicated that it did not remove the guardian because she had established a relationship with H.J. for a period of over one and one-half years, and to remove the guardian shortly after the death of H.J.'s mother and sister would have been detrimental to H.J. We find no abuse of discretion.

Finally, appellant's motion to strike one sentence in the guardian ad litem's brief and for an award of attorney fees incurred in bringing the motion is denied. The statement at issue was not material to the decision in this appeal.

Affirmed.

/ s /
7-16-93

OFFICE OF
APPELLATE COURTS
SEP 30 1993
FILED

STATE OF MINNESOTA
IN SUPREME COURT
C4-92-2288 - C1-93-508 - C3-93-509

In Re the Custody of H.J., a Minor.

and

In the Matter of the Appointment
of a Trustee for the Next-of-Kin of
L.J. and J.J., Decedents.

and

In Re the Guardianship of: H.J., Ward.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for further review filed in the above-entitled matters be, and the same is, denied.

Dated: September 30, 1993

BY THE COURT:
/ s /
Chief Justice

Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

No. 93-1041

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 199__

JAY JOHNSON,

Petitioner,

vs.

DODGE COUNTY
DEPARTMENT OF HUMAN SERVICES,
et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, guardian ad litem Gail D. Baker, is dissatisfied with Petitioner's statement of the questions presented. Petitioner has not complied with Rule 14.1(a) of the Rules of the Supreme Court of the United States by his inclusion of three introductory paragraphs. Those paragraphs are argumentative and contain misstatements of facts. Respondent is not dissatisfied with the form of the four enumerated questions presented. However, the facts in this case do not give rise to Petitioner's Questions Presented as legitimate justiciable federal questions, as will be discussed hereinafter.

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 199__

JAY JOHNSON,

Petitioner,

vs.

DODGE COUNTY
DEPARTMENT OF HUMAN SERVICES,
et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Minnesota Supreme Court's order denying petitioner's petition for review.

JURISDICTION

Petitioner claims this court has jurisdiction to grant the requested writ of certiorari to review the decision of the Minnesota Supreme Court entered on September 30, 1993 pursuant to 28 U.S.C. 1257. As will be discussed hereinafter, Petitioner has not established jurisdiction as required by Rule 10.1 and Rule 14.1.(h) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Material Facts

Petitioner, Jay Johnson, is the natural father of the child, H.J., the subject to this proceeding. Petitioner met and married Lucy Teberg in September, 1976. Prior to the marriage, Petitioner was aware that she had a history of mental illness with previous hospitalization. Two children were born of the marriage: J.J. born May 28, 1979, and H.J. born September 6, 1982.

(Petitioner's Appendix A-4, hereinafter PA-4)

When first in Minnesota, the Johnsons lived with another family, the Jacobsons, for three turbulent and stressful months, during which time the Jacobsons observed punishment of the Johnson children by their parents which constituted physical and emotional abuse, withholding and restricting the types and amounts of food, and bizarre and strange behavior by Petitioner toward his wife and children which led Mr. Jacobson to ask the Johnsons to leave. During the next six months, the stress level in the Johnson home escalated. Members of the Johnsons' church had grave concerns about the safety of the children, as the evidence of physical and emotional abuse became more serious, observing nicks on the children's noses, hearing screaming, seeing the children hiding from their father, and

listening to the children reporting other abuse. The Johnsons asked several members of the church to care for their children. Finally, in September, 1989, when the stress, chaos and violence apparently overwhelmed them, the Johnsons placed their two girls with Ron and Linda Christenson. (PA-6,7)

In September of 1989, the Dodge County Department of Human Services, hereinafter referred to as "DCDHS", became involved with the Johnson family, responding to several reports of neglect and abuse. (PA-7) DCDHS personnel interviewed J.J. and H.J. Both children reported the abuse that they experienced at the hands of their parents. Specifically, H.J. reported, that: her mom and dad were "fighting and arguing"; and hit each other; hurt her by hitting her all over her body with a closed fist for every little reason; her dad spanked her two times a week

with her pants down using a closed fist; that when she cried her dad pinned her down on the floor and covered her mouth so that she could not breathe; when she kicked him he covered her mouth even more; her dad almost killed J.J. once; he sat on J.J.'s leg and almost broke it; if either child tried to help the other one they both "got it"; one time she and J.J. lived with another family for about one year; they did not get much to eat and she never ate supper; for breakfast or lunch she ate fruits or vegetables, and hardly ever drank milk; and, that when sick, she went to a "different kind of doctor" and had either a hot or cold foot bath. (PA 7-9)

DCDHS personnel also spoke privately with the Christensons who reported that Petitioner and Lucy Johnson were having financial problems, creating a great deal of stress between them; had "WWIII fights" over

everything, even when talking on the telephone with J.J. and H.J.; Lucy Johnson had been in a mental hospital for about one year, so another family took care of J.J. and H.J.; when the children saw their father, they hid on the floor of the car, sucked their thumbs, and curled up in a fetal position; H.J. wore diapers to bed because she wet her pants every night; and that J.J. had gained eight pounds since she started staying at their home two weeks before. (PA-9)

The social worker who handled the case reported that the children were at intermediate or high levels of risk and that intervention was necessary because of excessive physical punishment, inappropriate nourishment, placement of the children outside of the home, marital stress and discord, possible mental illness of one or both parents, and frequent moves. A

voluntary placement agreement was signed by Petitioner and Lucy Johnson on September 22, 1989, and a protective service plan was prepared on October 9, 1989. Placement continued with the Christensons until they expressed reluctance to continue to care for the Johnson children. (PA-10) On October 13, 1989, the children were placed in foster care with the Respondents, Mark Dulaney and Diane Dulaney, (hereinafter Dulaneys). Petitioner was notified of the foster placement. Petitioner left the state of Minnesota at that time (PA-11), and, except for the month of February, 1990 (PA-147), and his attendance at some court hearings, did not return to Minnesota until July 7, 1991. (PA-28).

The Petitioner and Lucy Johnson were Seventh Day Adventists. DCDHS and the Dulaneys made efforts to learn about, comply with, and accede to, various Seventh Day

Adventist dietary, educational, and other religious practices, including vegetarian meals, J.J.'s continued attendance at a Seventh Day Adventist school, and attendance of the children at Sabbath services on Saturdays. (PA-11, 12)

On November 9, 1989, a Child in Need of Protective Services Petition (hereinafter CHIPS) was filed against both parents. (PA-13) Lucy Johnson admitted the petition's allegations at a hearing on November 15, 1989. At a hearing on February 15, 1990, Petitioner admitted two of the petition's three allegations, which set forth Minnesota Statutes Section 260.015, Subd. 2a(2) and (8). He admitted spanking the children with a wooden spoon, and on at least one occasion, breaking the spoon while doing so. He also admitted covering the children's noses and mouths with his hand

while spanking them so they could not breath or cry. (PA-14).

After finding the children in need of protective services following the Petitioner's and Lucy Johnson's admissions, the court ordered continued foster placement, evaluations of the parents and children and supervised visitation. The children and parents were evaluated and specific counseling and treatment were recommended for both.

A dispositional hearing was held on April 23, 1990, at which Petitioner was ordered to participate in individual and group therapy for parents who had abused their children and attend parenting classes. The court also ordered the transfer of J.J. to public school; procedures for H.J. to have surgery, if necessary, because Petitioner opposed those requests; and that

the children continue counseling. (PA-18, 19)

Following the hearing, Petitioner returned to Hawaii and began attending parenting classes and individual therapy through the "Alternatives to Violence" program. (PA-19) Court reports from June through November, 1990, indicated that Petitioner was making no progress in the program and counseling. In December, 1990, Petitioner discontinued participation in the program and counseling citing "religious differences." (PA-19-22)

Based on the reports of no progress by Petitioner in his counseling, the court at review hearings in July and October, 1990, continued the terms of the previous orders, specifically finding as to Petitioner that "even though he was attending counseling, he had yet to deal with the issues of abuse"

and "the girls had a strained relationship with their father." (PA-20-22)

During the first six months that the children were residing with the Dulaneys, Lucy Johnson separated from the Petitioner. After Lucy Johnson separated from Petitioner, she changed her dietary habits, began to eat previously restricted foods, and introduced those foods to H.J. and J.J. during visitations. (PA-16) In October, 1990, Lucy Johnson commenced a dissolution proceeding and requested custody of J.J. and H.J. (PA-22)

In February, 1991, the children visited Petitioner in Hawaii with Respondent, Diane Dulaney, supervising the visit. During the visit, Petitioner called DCDHS requesting that the children be allowed to remain with him in Hawaii. DCDHS refused to allow them to stay, but assured Petitioner that when back in Minnesota, an assessment would be

done on the current situation and what was best for the children. (PA-24, 25) Upon their return to Minnesota, the children told their therapist, Marcia Guertin, the guardian ad litem, social workers, and the Dulaneys that they had enjoyed Hawaii, but did not want to live there with their father. (PA-26)

Despite requests to Hawaiian Child Protective Services and Petitioner's counselor, Reverend Roberts, for reports on Petitioner, no written reports were received before the next scheduled review hearing on April 17, 1991. (PA-26, 27). The Dodge County social worker spoke with Reverend Roberts by telephone prior to the hearing. Reverend Roberts indicated Petitioner was not ready to parent his children, and that he would not be ready until he took ownership for their situation, and let others provide input and guidance in his

life. Therefore, the court again continued the terms of the previous court orders with Reverend Roberts as Petitioner's new counselor and requested progress reports for the next review hearing. (PA-27)

The decree of dissolution of Lucy Johnson and Petitioner's marriage was signed by Judge Roger S. Plunkett on July 3, 1991 with Judgment entered on July 8, 1991. (PA-28) On July 6, 1991, a car accident occurred killing Lucy Johnson and J.J. H.J. sustained a closed head injury, cuts, bruises, and a broken right leg requiring surgery. (PA-28) Petitioner returned from Hawaii on July 7, and stated that he would be taking H.J. back to Hawaii to live with him when she was released from the hospital. (PA-28, 29) DCDHS set up daily visits for Petitioner with H.J., but H.J. resisted or refused to visit with her father. (PA-30) H.J. exhibited further oppositional and

self-destructive behavior, and was extremely afraid she would have to leave the Dulaneys. (PA-42) By letter dated July 15, 1991, Marcia Guertin, strongly recommended continued placement with the Dulaneys because of H.J.'s intense psychological bond with them, stating that to sever the relationship then would be detrimental to H.J.'s emotional well being and her integration and healing from the deaths of her mother and sister. (PA-30) In an August 19, 1991 Order, the court denied Petitioner's requested dismissal of the CHIPS Petition and that H.J. be allowed to return to Hawaii with him and ordered DCDHS to set up a reasonable and liberal visitation plan with a thirty (30) day review, indicating that the court was considering transferring jurisdiction to Hawaii to facilitate reunification of H.J. with her father. (PA-33) On August 19,

1991, the Dulaneys commenced a custody proceeding to obtain legal and physical custody of H.J. (PA-35)

Visitation continued to be a problem. DCDHS set up extensive visitation opportunities, but H.J. continued to resist or refuse visitation. (PA-33) The guardian ad litem, social workers, H.J.'s therapist, and the Dulaneys discussed and encouraged visitation, making multiple attempts to modify and change the visits so that H.J. would go. (PA-33, 34)

By Order of the trial court dated September 12, 1991, the CHIPS and custody cases were consolidated and the court ordered a home study and joint counseling for Petitioner and H.J. (PA-36) Petitioner and H.J. commenced joint counseling with Marcia Guertin on October 9, 1991. Nine one hour sessions of joint counseling did not improve the relationship between Petitioner

and H.J. Petitioner continued to be unable to empathize with H.J., refused to accept and/or understand H.J.'s attachment to the Dulaneys, or reflect back on what H.J. was thinking or feeling. (PA-36, 37)

Visitation deteriorated further in the fall and winter of 1991 with H.J. refusing over one-half of the visits. H.J.'s behavior regressed with increased acting out, and a resumption of bedwetting after each visit or joint counseling session. Finally it was recommended that H.J. go to respite care on court ordered visitation weekends if she refused to visit with Petitioner, but she still continued to refuse some scheduled visits. H.J.'s last visit with Petitioner prior to the commencement of the trial occurred on the weekend of February 15, 1992. H.J. reported Petitioner again used physical force when she did not obey his whim. (PA-37-39)

The court held a full hearing (referred to as the "trial" herein) which lasted sixteen (16) days. At the trial Ms. Guertin testified that Petitioner was not a fit or suitable parent, because of his past behavior, personality characteristics, and inability to empathize with H.J. Ms. Guertin concluded that it would actually be detrimental to place H.J. in her father's care, and that extraordinary circumstances existed which required the placement of H.J. with a third party non-biological parent. (PA-44-47) Ms. Guertin (PA-46), Dr. William Friedrich (PA-57), who did psychological and parenting evaluations on all parties, this respondent (PA-70), three Dodge County social workers (PA-710), and H.J.'s maternal grandfather (PA-95), all testified in support of the Dulaneys request to be granted custody of H.J. The court made lengthy and very specific findings of fact,

prepared a detailed memorandum of law, and concluded that Petitioner was not a fit or suitable parent, as contemplated by Minnesota law, to have custody of his remaining minor daughter, H.J., and that it was in H.J.'s best interest that permanent legal and physical custody be granted to the Dulaneys, subject to reasonable and liberal visitation of Petitioner under such supervision and at such times as deemed appropriate by DCDHS upon consultation with the Dulaneys. The CHIPS proceeding was dismissed, and Petitioner's child support obligation was reaffirmed with the exact amount reserved for later determination. (PA-102)

By order dated November 3, 1992 the court denied Petitioner's requests that future visitation be unsupervised, DCDHS prepare a reunification plan, and that specific summer visitation be set for H.J.

with her grandparents in Hawaii. (PA-139-140)

Petitioner appealed the trial court's decision to the Minnesota Court of Appeals, which affirmed the decision in an unpublished opinion dated July 16, 1993. The appellate court found that the trial court did not abuse its discretion in refusing to transfer jurisdiction to Hawaii, in failing to dismiss the CHIPS Petition prior to trial on Petitioner's allegation that DCDHS did not comply with state provisions regarding administrative review, and finding that the periodic court reviews substituted for administrative review required in involuntary foster placements. Further, the court found that Petitioner was precluded from contesting the propriety of the placement on ethnic heritage grounds due to his failure to appeal the disposition order, that the trial court did not abuse

its discretion in consolidating the custody and CHIPS proceedings, and that there was no error in the findings that Petitioner was unfit and that it was in the best interests of H.J. for custody to be granted to Respondents Dulaneys. (PA-148-154). Further review was denied by the Minnesota Supreme Court by Order dated September 30, 1993. (PA-155)

B. Petitioner's Failure to Raise The Federal Questions In the State Courts

Petitioner has failed to comply with the requirements of Rule 14.1.(h) of the Rules of the Supreme Court of the United States. Rule 14.1.(h) states:

> "(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent

> quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears... as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari..."

Petitioner does not specify the stage in the proceedings, either at the trial court, Minnesota Court of Appeals, or the Minnesota Supreme Court, at which he raised the federal questions he now asks this Court to review. There is no reference to the method or manner of raising them or to the way in which they were passed upon by those courts, nor does Petitioner quote or make specific reference to the places in the record where the matter appears. Petitioner has totally failed to comply with the requirement of the rule.

In referring to 28 U.S.C., Section 1257 (the statute which Petitioner claims

provides jurisdiction here) this Court in Webb v. Webb, 451 U.S. 493 (1981) stated:

> "That statute requires that in the state courts Petitioners have 'specially set up or claimed under the Constitution... of... the United States' that right which she now seeks to have this court enforce... This Court has frequently stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary...
>
> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the

record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Id. at 495-6.

Not only did Petitioner fail to comply with the technical requirements of Rule 14.1.(h), but he totally failed to present the federal questions he attempts to raise here at any stage of the state court proceedings in Minnesota. For convenient reference, Respondent has set forth in her appendix (hereinafter "RA-") to this brief the pertinent portion of Petitioner's brief to the Minnesota Court of Appeals wherein he set forth the legal issues he then raised. (RA-1-3) Also included in the appendix is Petitioner's entire (except the appendix) Petition to the Minnesota Supreme Court for review of the decision of the Minnesota Court of

Appeals. (RA-4-10) These documents conclusively show that these issues were not raised in the Minnesota courts.

This Court is without jurisdiction to address federal questions not raised in the state courts. The petition for writ of certiorari should be denied on this basis alone, and no further review by this Court should be required.

REASONS FOR DENYING WRIT

As noted, Petitioner did not raise the federal questions he now seeks to have this Court review at any stage of the state court proceedings. Nevertheless, Respondent will address the first three issues in the order that they were presented by Petitioner. This Respondent is not involved in the fourth issue.

1. Petitioner's due process rights were not violated by the consolidation of the CHIPS and custody proceeding.

Petitioner misstates the facts in his framing of this issue. The trial court in its September 27, 1991 order provided:

> "1. That the Custody Petition of Dulaneys (file no. F3-91-371) and the CHIPS proceeding in the matter of the welfare of H.J. (file no. J2-89-50162) may be and hereby are consolidated for future proceedings. (Emphasis added)
>
> 2. That an evidentiary hearing on the Petition of Custody of Dulaneys may be and hereby is granted, and the matter shall be expedited." (RA-36)

There was no intervention, but simply a consolidation of a custody and child protection (CHIPS) proceeding for hearing.

Petitioner has not presented a justiciable federal question. He makes reference to the Constitution and his rights, but fails to establish how his

First or Fourteenth Amendment rights have been violated. As the record amply demonstrates, the courts in Minnesota afforded Petitioner a full measure of due process in both the CHIPS action initially and later in the trial on the custody petition that was consolidated with the CHIPS case, which was then being reviewed by the court following its initial disposition.

The trial court, as later affirmed on appeal, was following established Minnesota procedure in consolidating both matters. Both matters had as their primary consideration the determination of, and protection of, the best interests of the child, H.J. Best interest of the child is the overriding consideration even in disputes between natural parents and a third person. In Re Custody of N.M.O., 399 N.W.2d 700, 703 (Minn. Ct. App. 1987).

Proceedings for permanent custody, such as Dulaneys' action here, may be maintained concurrently with a neglect and dependency (now CHIPS) proceeding. In Re the Custody of E.A.Q.D., 405 N.W.2d 262, 264 (Minn. Ct. App. 1987). In E.A.Q.D., the court determined that "the best interest of the child will best be served by the joinder of the contested issues in one court at one time." Id. at 265. A later Minnesota Supreme Court case, Durkin v. Hinick, 442 N.W.2d 148 (Minn. 1989), noted that "the guiding principal in all custody cases is the best interest of the child," in reaching its conclusion that a dependency and neglect petition would properly be consolidated with a petition for custody by a third party. Petitioner cites the more recent case, In the Matter of the Welfare of J.L.U., 450 N.W.2d 642 (Minn. Ct. App. 1990). In that case the court

noted that in appropriate cases, juvenile protection cases may be maintained concurrently with custody proceedings. The court stated:

> "Where concurrent juvenile protection and custody proceedings are pending, consolidation may be appropriate, and the facts of a particular case may justify the dismissal of juvenile protection proceedings, where an award of permanent custody will alleviate the temporary risk to the children." Id. at 644.

That is exactly what happened here. While Petitioner cited this case and quoted some language from it, he neglected to advise the court of the above language and the legal conclusion that consolidation is appropriate.

For some time Minnesota has permitted third parties to institute proceedings for

custody against natural parents with determinations based upon the welfare and best interest of the child. Jaroszewski v. Prestige, 249 Minn. 80, 81 N.W.2d 705 (1957). This right of third parties has been determined to include the right of foster parents to intervene in proceedings concerning their foster children, Weiler v. Lutz, 501 N.W.2d 667 (Minn. Ct. App. 1993), and even in such significant matters as termination of parental rights cases. In the Matter of the Welfare of C.J., 481 N.W.2d 861 (Minn. Ct. App. 1992). In Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971), the Minnesota Supreme Court discussed the test to be applied in such cases:

> "Thus, it would seem to be a fundamental rule of law that, all things being equal, as against a third person, a natural mother would

be entitled as a matter of law to custody of her minor child unless there has been established on the mother's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, ...; or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child." Id. at 630.

These third party actions, like this case, concern the welfare and custody of a child. The fact that a foster parent is involved in this case does not give rise to a federal question concerning Petitioner's constitutional rights as a natural parent. As stated in Leonard v. Mitchell, 473 F.2d 709 (2nd Cir. 1973):

"for it is beyond dispute that the

state has a substantial range of authority to protect the welfare of children... This power extends to the determination of parental custody and visitation rights." Id. at 713.

Petitioner, in the guise of alleged federal questions, is asking this Court to involve itself in a custody dispute. In Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982), this Court stated:

"the State's interest in finality is unusually strong in child-custody disputes... It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his

current 'home', under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions." Id. at 513-514.

The court here had established the Petitioner's incapacity by virtue of its initial CHIPS findings and subsequent review hearings, and thereafter, at the trial on Dulaneys' request for custody of H.J., determined that Petitioner was an unfit parent, and that it was in H.J.'s best interest to be in Dulaneys' custody. There is no argument set forth by Petitioner justifying this Court's prolonging the uncertainty of H.J.'s custody by granting the writ of certiorari. The mere fact that states

differ on the role that foster parents can take in custody matters does not create a justiciable federal due process or equal protection issue.

2. Petitioner's due process and equal protection rights as a biological father were not violated.

Essentially, Petitioner argues that he was denied procedural due process. While Petitioner discusses due process, he completely fails to set forth any equal protection arguments, other than the mere inclusion of that claim in the framing of his issue.

As concerns Petitioner's due process allegations, DCDHS did consider the Johnson family's religious beliefs in making the foster care placement. Court reviews properly substituted for the administrative review. There was no "qualified admission" to the CHIPS

petition. Petitioner admitted two of the three statutory grounds alleged. The court found no discrimination against petitioner, and none occurred. Consequently, there was no lack of due process, and no violation of Petitioner's due process rights.

3. **Petitioner's First Amendment rights to freely exercise his religious beliefs were not violated.**

Petitioner has attempted throughout this case to assert his religious beliefs, his right to hold those beliefs, and his right to exercise those beliefs freely as a basis for insisting on the return of his daughter, H.J., to his custody. This assertion had as its purpose the goal of derailing the trial court's inquiry and proper focus upon H.J.'s welfare and the protection of her best interest.

There is no dispute with the fact that with parental custody comes the ability to make decisions about a child's religious upbringing. Minnesota Statutes Section 518.003 Subd. 3 states: "(a) "Legal custody" means the right to determine the child's upbringing, including education, health care, and religious training." In Minnesota there is a presumption that a natural parent is a fit and suitable person to be entrusted with the care of his child and that, ordinarily, it is in the best interest of the child to be in the custody of his natural parent. In re Welfare of Clausen, 289 N.W.2d 153, 155 (Minn. 1980). However, "if the evidence as a whole clearly demonstrates that the best interest of the child demands a different disposition, the best interest of the child must prevail." In the Matter of the

Welfare of C.K., 426 N.W.2d 842, 847 (Minn. 1988). Thus parental rights, including rights to make religious decisions about one's children, are not absolute, as petitioner seems to be contending.

This court has long held, in oft-quoted language, that:

> "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S. Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitation... The state as parens patriae may restrict the parents control... Its authority is not nullified merely because the parent grounds his claim to control the

> child's course of conduct on religion or conscience... It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious convictions."

Prince v. Massachusetts, 321 U.S. 158, 166, 7 (1944).

In this case the state took action through its CHIPS proceeding to provide immediate protection for H.J. in order to ensure that she would no longer be subjected to physical and emotional abuse, and to ensure that she would be provided with adequate nutrition. Rather than remain in Minnesota to work on reunifying with his children, Petitioner left the

state, and returned only for short periods of time when some of the court hearings were held. Petitioner did not comply with the court's CHIPS orders regarding his counseling obligations. During this same period of time, his now deceased ex-wife, remained in Minnesota and worked towards reunification. Petitioner returned to Minnesota only after the tragic deaths of his ex-wife and his older daughter. Given Petitioner's failure to rehabilitate himself and the continued deterioration of his relationship with H.J., even after his return, H.J. would have been left without appropriate permanent custodial care had the Dulaneys not sought to provide that care by seeking to be awarded custody of her. It is apparent from a review of the extensive trial court findings and the decisions of the appellate courts in Minnesota that none of Petitioner's

protestations at trial, nor the issues he raised on appeal, changed the conclusion that he was not fit to parent H.J. Petitioner's assertion that his First Amendment constitutional rights have been violated does not justify a different conclusion.

CONCLUSION

Petitioner did not raise the federal questions here presented in the Minnesota courts, nor has he complied with the rules of this Court requiring a specification of the stage at the state court proceedings where these questions were raised. Petitioner does not now spell out any federally justiciable questions before this Court. The petition for writ of certiorari should be denied.

Dated: January 27, 1994

Respectfully submitted,

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[Legal issues set forth in Petitioner's brief to the Minnesota Court of Appeals]

LEGAL ISSUES

I. Did the Court err in: failing to dismiss the CHIPS Petition before trial based upon the failure of Dodge County to comply with applicable statutes and regulations; failing to refer the entire proceedings prior to trial to Maui County, the jurisdiction of the Minor's sole surviving parent; permitting the custody petition of the foster parents to be heard jointly with the CHIPS proceeding; failing to limit testimony to issues involving the CHIPS proceeding and family placement with Appellant, precluding evidence relating to Respondents' custody Motion; failing to make Findings as required in a CHIPS proceeding under Minn. Stat. 260.191, subd. 1; and granting the foster parents custody despite an insufficient showing of evidence to overcome the father's natural custodial preference. In post-trial motions, did the trial Court err in: denying Appellant's Motion to modify the requirement that visitation be supervised, and failing to compel Dodge County Human Services to provide Appellant with a plan for reunification with his daughter H.J.?

Trial Court held: In the negative.

II. Did the Court err in: denying the intervention request by H.J.'s paternal grandparents seeking her

custody; and in post-trial motions, declining to establish their visitation schedule.

Trial Court held: In the negative.

III. Did the Court err in permitting into evidence remote in time, consisting of hearsay testimony by Appellant's deceased wife Lucy, deceased daughter Joyfull, and surviving daughter H.J., without advance notice under Minn. Stat. 595.02, subd. 3 and 260.156 of any intent to present hearsay evidence by such witnesses?

Trial Court held: In the negative.

IV. Did the Court err in appointing the "CHIPS" Guardian as Guardian Ad Litem in the custody case, despite an obvious adversarial relationship demonstrated in the CHIPS proceeding and initial appointment as Trustee in the related wrongful death matter?

Trial Court held: In the negative.

V. Did the trial Court err in ordering withdrawal of the appointment of Appellant's counsel for "all post-trial proceedings" in the trial Court?

Trial Court held: In the negative.

VI. Did the trial Court err in: vacating the appointment of Appellant, natural father of sole surviving child H.J., as trustee in a wrongful death action, and appointing in his stead foster

parent-Respondent Mark Dulaney, and vacating sua sponte its Order filed December 17, 1992 which had not been appealed, and for which the time for appeal had expired?

Trial Court held: In the negative.

[Petitioner's Petition the Minnesota Supreme Court for review of the Decision of the Minnesota Court of Appeals]

STATE OF MINNESOTA

IN SUPREME COURT

In Re the Custody of:	PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS
H.J.,	
a Minor,	
----------	APPELLATE COURT CASE NUMBERS:
In the Matter of the Appointment of a Trustee for the next-of-kin of Lucy Kathleen Johnson and Joyfull Johnson,	C4-92-2288 C1-93-508 C3-93-509
	DATE OF FILING OF COURT OF APPEALS DECISION:
Decedents.	August 3, 1993

In Re the Guardianship of:

H.J., Ward.

TO: The Supreme Court of the State of Minnesota:

The Petitioner, Jay Johnson, requests Supreme Court review of the above-entitled

decision of the Court of Appeals upon the following grounds:

1. Statement of legal issues and their resolution by the Court of Appeals.

I. Did the Court err in: failing to dismiss the CHIPS Petition before trial based upon the failure of Dodge County to comply with applicable statutes and regulations; failing to refer the entire proceedings prior to trial to Maui County, the jurisdiction of the Minor's sole surviving parent; permitting the custody petition of the foster parents to be heard jointly with the CHIPS proceeding; failing to limit testimony to issues involving the CHIPS proceeding and family placement with Appellant, precluding evidence relating to Respondents' custody Motion; failing to make Findings as required in a CHIPS proceeding under Minn. Stat. 260.191, subd. 1; and granting the foster parents custody despite an insufficient showing of evidence to overcome the father's natural custodial preference. In post-trial motions, did the trial Court err in: denying Appellant's Motion to modify the requirement that visitation be supervised, and failing to compel Dodge County Human Services to provide Appellant with a plan for reunification with his daughter H.J.?

Trial Court held: In the negative.

II. Did the Court err in: denying the intervention request by H.J.'s paternal grandparents seeking her custody; and in post-trial motions, declining to establish their visitation schedule.

Trial Court held: In the negative.

III. Did the Court err in permitting into evidence remote in time, consisting of hearsay testimony by Appellant's deceased wife Lucy, deceased daughter Joyfull, and surviving daughter H.J., without advance notice under Minn. Stat. 595.02, subd. 3 and 260.156 of any intent to present hearsay evidence by such witnesses?

Trial Court held: In the negative.

IV. Did the Court err in appointing the "CHIPS" Guardian as Guardian Ad Litem in the custody case, despite an obvious adversarial relationship demonstrated in the CHIPS proceeding and initial appointment as Trustee in the related wrongful death matter?

Trial Court held: In the negative.

V. Did the trial Court err in ordering withdrawal of the appointment of Appellant's counsel for "all post-trial proceedings" in the trial Court?

Trial Court held: In the negative.

VI. Did the trial Court err in: vacating the appointment of Appellant, natural

father of sole surviving child H.J., as trustee in a wrongful death action, and appointing in his stead foster parent-Respondent Mark Dulaney, and vacating sua sponte its Order filed December 17, 1992 which had not been appealed, and for which the time for appeal had expired?

Trial Court held: In the negative.

2. Statement of the criteria of the rule relied upon to support the petition.

Supreme Court review of this matter is essential to correct an unjust decision which effectively transformed a minimal CHIPS Petition into a termination of parental rights case. A decision by the Supreme Court will help develop, clarify, and harmonize the law in CHIPS proceedings. This case calls for the application of a new principle which precludes hearing or joinder of third party child custody petitions until commencement of termination of parental rights proceedings. Resolution of the question presented has statewide impact, and

is likely to recur unless resolved by this Court.

3. Statement of the case.

Petitioner is the natural father of a 10-year-old H.J., sole family survivor of the fatal car crash which killed Petitioner's former wife and 12-year-old daughter, Joyfull, on July 6, 1991.

A "CHIPS" proceeding was commenced against Petitioner and his wife on November 9, 1989, resulting in his qualified admission to a portion of the allegations. Petitioner thereafter returned to his native State of Hawaii to comply with Social Services' requests and prepare his home for reunification with the children. In February, 1991, both children returned to Hawaii for a visit and desired to remain there for reunification with their father. Respondent Dodge County refused their request, despite the initial urging by

Respondent foster parent Diane Dulaney that such was in the best interest of the children.

Thereafter, the tragic accident in July, 1991 took the lives of Petitioner's former wife and their minor child, Joyfull. Petitioner immediately came back from Hawaii to Minnesota, seeking return of H.J.'s custody to him in Hawaii. Despite the Court's declared intent to reunite father and daughter, and to refer the case to Maui County for any further necessary proceedings, the Court permitted the foster parents to intervene with a Petition for permanent custody, which Petition was ultimately granted after 16 days of trial.

4. A brief argument in support of petition.

This case initially arose out of the voluntary placement of Petitioner's daughters as Petitioner and his

schizophrenic wife were having difficulties in their marriage. After voluntary placement, a CHIPS Petition was brought against both Petitioner and his now deceased wife. Minimal concerns were raised concerning Petitioner, with the serious concern focusing on his wife's manic depressive behavior.

The trial court stated that it could not "find that Human Services...had a plan to reunite the children with their father, Jay Johnson, and made little, if any effort in that direction... (A.125)", and also that Petitioner "has in essence followed the court Orders in this case (A. 192). The Court by pretrial Order had determined that this case was appropriate to transfer to Hawaii. The County Attorney also recommended that disposition, both before and after all trial proceedings were concluded, However, after hearing all the

trial testimony, Petitioner's sole surviving daughter was removed permanently from his custody.

The underlying reason for denying Petitioner custody of his own child was that a lengthy time of over two years had passed between his initial voluntary placement and the dispositional hearing. However, the cause of this delay included both the Human Services' Department failure to make reasonable efforts to reunite Petitioner with his daughter, and also the third party foster parents' petition for custody.

This case confirms the need for application of a new Statewide policy, preventing foster parents from intervening in CHIPS proceedings to wrongfully remove children from their natural parents. Resolution of this issue has potential statewide impact. Unless this question is now resolved, it is likely to recur with

continuing inconsistent and unjust results. For these reasons, Petitioner seeks an order granting review of the decision of the Court of Appeals.

DATED: August 31, 1993

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